SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 396

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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California Citizens Band Association, Incorporated, a corporation, by its attorney, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 7, 1967 and made

final on April 21, 1967 by the denial of a petition for rehearing.

OPINION BELOW

The opinion of the Court of Appeals is to be found in the Appendix attached to this petition. (C.A. 9, 20030.) This is a final judgment of the United States Court of Appeals for the Ninth Circuit wherein, after argument and submission of the appeal on December 12, 1966, a decision was rendered on March 7, 1967 affirming certain rule making action on the part of respondent Federal Communications Commission. A petition for a rehearing filed by petitioner on April 6, 1967 was denied on April 21, 1967. The aforesaid opinion is printed as Appendix "A". The decision of the respondent Commission which promulgated the rules challenged herein by petitioner is printed as Appendix "B". The Judgment of the Court of Appeals is printed herein as Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 7, 1967. A petition for a rehearing, filed by petitioner April 6, 1967, was denied on April 21, 1967. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 *U.S.C.* Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the infringement of the rights of the members of petitioner who are holders of Citizens Band Class D radio licenses, by respondent Commission (at least as to operating time) in restricting operating time and the use of frequencies contrary to the provisions of Sec. 303 (f) of the Communications Act of 1934, 48 Stat. 1082, 47 *U.S.C.* 303 (f), was not sufficiently "drastic" to be in violation of the due process clause of the Fifth Amendment of the *U.S. Constitution.*

2. Whether the Court of Appeals erred in holding that under the circumstances herein, respondent Commission was not required to afford petitioner a public hearing prior to the amendment of its rules, although petitioner had requested the same.

3. Whether the Court of Appeals erred in refusing to remand the controversy on the ground that the respondent Commission acted arbitrarily, capriciously and not in the public interest by promulgating rules based on evidence in its files which it did not make a part of the record in the proceedings.

4. Whether the Court of Appeals erred in denying the motion made by petitioner both prior to and at the hearing herein on December 12, 1966 for an order requiring respondent Commission to produce the additional evidence which had not been made a part of the record in the rule making proceedings.

5. Whether the Court of Appeals erred when it declined to review the substantiality of the evidence upon which the rule making was based.

6. Whether the Court of Appeals erred in holding that the new rules were not a Bill of Attainder in violation of Article I Sec. 9 of the *U.S. Constitution.*

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article I Sec. 9 (3);
U.S. Constitution, Fifth Amendment;
47 *U.S.C.* Secs. 303(f) and (r);
47 *U.S.C.* Sec. 402 (a);
47 *U.S.C.* Secs. 316 (a) and (b);
5 *U.S.C.* Sec. 1033;
5 *U.S.C.* Sec. 1009;
5 *U.S.C.* Sec. 1034;
47 *U.S.C.* Sec. 501;
47 *U.S.C.* Sec. 502.

All of the above are printed in Appendix "D" hereof, except those cited verbatim in the argument.

STATEMENT OF THE CASE

Petitioner, California Citizens Band Association, Incorporated, is a tax-exempt, non-profit corporation, duly incorporated under the laws of the State of California, a citizen and resident of the State of California with its principal office in Alameda County, California. Each member of petitioner is an organized Citizens Band Radio Club, membership of which consists of radio station licensees, duly licensed by re-

spondent Federal Communications Commission to hold radio station licenses in the Class D Citizens Band. There are approximately nine clubs located in Northern California which are members of petitioner, and the members of the individual clubs are from all walks of life, including invalids and disabled persons.

The Citizens Radio Service is a relatively recent avenue of communication afforded citizens of the United States. No technical radio knowledge is necessary to obtain a license, and the only thing the applicant must do to qualify is to familiarize himself with the rules of the respondent Commission pertaining to the Citizens Radio Service. The Citizens Radio Service differs from the Amateur Service in that the amateur, in order to obtain his license, must pass a code reception and radio theory examination. The Citizens Radio Service is a low-powered, short range system of communication. There are four classifications of station licenses in the Citizens Radio Service of which Class D is one.

A Class D station is one operating on an authorized frequency of in the 26.96-27.23 MC/S frequency band, or on the frequency 27.255 MC/S with an authorized plate input power of 5 watts or less, for radiotelephony only. (There are 23 channels of communication on this band.) A Class D station is primarily licensed as a mobile station, but under certain conditions may operate at fixed locations. A Class D licensee is permitted to control and operate more than one unit. He thus may have a unit in his home, his automobile, his place of business or his boat, for ex-

ample. At the present time, there are approximately 1,000,000 Class D Stations licensed by respondent Commission to operate one or more units.

Citizens Radio Service equipment is readily available and its use is widespread and valuable. In times of emergency, the Service has saved lives and property and, in many instances, has been the sole means of communication in stricken areas. The use of Citizens Radio Service, or "CB" as it is known, has been of inestimable help to farmers and others in rural and remote areas in enabling them to communicate with their bases of operation. Civilian Defense groups have made great use of CB, as have many law enforcement agencies. Thousands of businesses have and still are employing CB in their commercial activities such as communication between company vehicles and headquarters. Millions of dollars have been spent by licensees for CB radio equipment.

Petitioner feels that it might be helpful to the Court for it to provide a brief summary of the history of the Citizens Radio Service. In 1944, in Docket No. 6651, respondent Commission recognized the fact that a complete review of the allocation of bands of frequencies was necessary. In February, 1945, respondent Commission announced that a hearing would be held and that one of the items to be considered was the Citizens Radio Service. This was the first time that the foregoing designation was used. In 1946, respondent Commission set up the Citizens Radio Service with Class A and Class B stations on the 460-470 MC/S frequency band. In 1947, frequency alloca-

tions were made, and the first rules governing the Service were adopted. In 1948, respondent Commission officially defined the Citizens Radio Service as follows:

> "A radio communication service of fixed, land or mobile stations, or combinations thereof, intended for use by citizens of the United States for private or personal radio communication (including radio signalling, control of objects by radio, and other purposes)."

The rules of respondent Commission pertaining to the Citizens Radio Service were first designated as Part 19. On September 11, 1958, the respondent Commission amended Part 19 to include the licensing of Class D stations. Licenses for all stations in the Citizens Radio Service were to be issued for a term of five years. As of March 12, 1959, Class D stations were free to operate on all 23 channels of the band. In 1960, respondent Commission promulgated a rule which required that in interstation communication between separate licensees, transmission would be limited to five consecutive minutes followed by a two minute silent period.

On November 22, 1962, respondent Commission initiated the proposed rule making which eventually culminated in the adoption of the rules which went into effect April 26, 1965 and which petitioner attacked by filing comments and objections with the respondent Commission. The proceedings in the respondent Commission were entitled "Docket 14843". Comments were invited and thousands of persons re-

sponded. No public hearings were held although the same were requested. Several stay orders were granted by respondent Commission, and subsequently, Part 19, which was redesignated as Part 95, went into effect as amended on April 26, 1965. Petitioner then timely filed its action number 20030 in the Court of Appeals to set aside the order of said respondent Commission. Two of the more serious changes made by respondent Commission were to restrict from 23 to 7 channels interstation communication by different licensees and to require licensees to observe a five minute silent period after five minutes of transmission with another licensee in interstation communication. The foregoing changes were affirmed by the Court of Appeals, although respondent Commission had made the same without a public hearing after request in the face of statutes (47 *U.S.C.* 303 and 47 *U.S.C.* 316) requiring the same. The Court of Appeals also affirmed the adoption of rules which were based on secret material in the possession of respondent Commission. The Court of Appeals also held that it was not required to determine the substantiality of the evidence upon which the rules were based. In this regard the Court stated that it was not in a position to rule on whether or not the respondent Commission had acted arbitrarily and capriciously in the selection of the 7 channels for interstation communication.

In respect to the jurisdiction of the Court of Appeals, 47 *U.S.C.* Sec. 303 provides that the Federal Communications Commission has the power in the public interest to make rules and regulations control-

ling radio station operation in the United States not inconsistent with law and to enforce the same. 47 *U.S.C.* 402 (a), 5 *U.S.C.* 1033 and 5 *U.S.C.* 1034 provide a procedure whereby any aggrieved party may file a petition in the Court of Appeals of his residence to annul or set aside the order of respondent Commission (See Appendix "D".)

REASONS FOR GRANTING THE WRIT

For the purposes of clarity, a short statement of reasons for granting the writ is here set forth. These are expanded in the argument following this resume.

1. The decision of the Court of Appeals is in conflict with the decisions of this Court as to whether infringement on admitted rights has to be "drastic" in order to invoke the due process clause of the Fifth Amendment of the *U.S. Constitution.*

2. The decision of the Court of Appeals is in conflict with the decision of this Court in *Interstate Commerce Comm. v. Louisville and Nashville RR.*, 227 U.S. 88, as to the sustaining of a rule which was based on evidence not in the record but considered by the Commission.

3. The decision of the Court of Appeals is in conflict with the decision of this Court in *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, in respect to the question of a full hearing.

4. The decision of the Court of Appeals is in conflict with the decision of this Court in *U.S. v. C.M.*

St.P. & P., 294 U.S. 499, in refusing to rule on the expertise of the respondent Commission in reducing the channels from 23 to 7 for interstation communication.

ARGUMENT

1. REQUIREMENT THAT ACTION BY THE RESPONDENT COMMISSION MUST BE DRASTIC BEFORE CONSTITUTIONAL PROTECTIONS ARE INVOKED.

47 *U.S.C.* 303 (f) reads as follows:

"*Powers and Duties of Commission*

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;"

47 *U.S.C.* 316 reads as follows:

"*Modification by Commission of station licenses or Construction permits; burden of proof.*

(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term

thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: Provided, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

Clearly, from the foregoing statutes, a licensee has a right to a public hearing if changes are to be made in his times of operation and the frequencies he may use for communication. In the case at bar, the rule changes provided that in regard to the silent period required after each five minutes of communication with other Class D licensees, the time would be increased from two to five minutes. The respondent Commission ruled in its memorandum opinion and order (See Appendix "D") that such an increase in silent time did not invoke such a change in a basic license right as to require a hearing under 303 (f).

The Court of Appeals agreed with the Commission's position stating on page 14 of its decision herein:

> "The rule change in question, enlarging the silent period from two to five minutes in Class D inter-station communications, constitutes a relatively minor adjustment. In so concluding, we take note that the primary purpose of a clear Class D license is for intra-station communication. Minor changes in carrying on inter-station communication could not, therefore, be considered of sufficient consequence to entitle a Class D licensee to a public hearing under section 303 (f).
>
> However, this is not to imply that the Commission could make changes at will in Class D licenses without allowing a public hearing. A drastic change in the allowable operation of a Class D license could result in a judicial determination that a basic license right has been abused, entitling the licensee to a public hearing under section 303 (f)."

The Court thus considered the change a relatively minor adjustment. It is to be remembered that the Class D licensee is entitled to operate 24 hours a day 7 days a week. Calculation will show that if a licensee starts with five minutes of operation and then observes two minutes of silence, continuing the same procedure for a one hour period, he will be able to operate for forty-four minutes. Using the five on five off formula for the hour period, he will be able to operate in inter-station communication for only thirty minutes. The Court of Appeals states that the differential of fourteen minutes per hour is a

"relatively minor adjustment". Petitioner does not agree. A 23% cut in operating time is not minor.

A right given by statute is valuable to the holder thereof and should not be infringed upon without compliance with the procedures required by due process of law. Here, admittedly, is a change in operating time, but the Court states that it isn't of sufficient consequence to entitle the licensee to a public hearing. It is well to remember that there are approximately one million licensees who are being affected by the action of respondent Commission. The Court is thus holding in effect that federal admistrative agencies have the power to determine whether an infringement on a right is substantial enough to be protected by the due process clause of the *Fifth Amendment of the U.S. Constitution.* Such an interpretation would permit the agencies to whittle on and eventially erode the entire right without following any of the procedural safeguards.

In the history of the United States, "rights" have always been of the utmost importance, and our founding fathers took great care to see that the means for safeguarding those rights were instituted. Our Supreme Court since its inception has always been the bulwark protecting the people against encroachment on their rights.

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, which was a case involving the security risk list of the attorney general, Justice Douglas stated as follows in his concurring opinion on page 177:

> "When the government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path."

A few years ago, four of the present members of the Supreme Court addressed the students at New York University in what were entitled the James Madison Lectures. Those who participated were Chief Justice Warren, Justices Black, Douglas and Brennan. Justice Brennan spoke on the Fourteenth Amendment while the subject matter of the others concerned the Bill of Rights. These speeches were reported in a book published in 1963 which was entitled "The Great Rights" and edited by Edmund Cahn. The subject of Justice Black's lecture was "The Bill of Rights and the Federal Government". Mr. Cahn in his book on page 62 quotes Justice Black as follows:

> "The provisions of the Bill of Rights that safeguard fair legal procedures came about largely to protect the weak and the oppressed from punishment by the strong and the powerful who wanted to stifle the voices of discontent raised in protest against oppression and injustice in public affairs. Nothing that I have read in the Congressional debates on the Bill of Rights indicates that there was any belief that the First Amendment contained any qualifications. The only arguments that tended to look in this discretion at all were those that said 'that all paper barriers

against the power of the community are too weak to be worthy of attention.' Suggestions were also made in and out of Congress that a Bill of Rights would be a futile gesture since there would be no way to enforce the safeguards for freedom it provided. Mr. Madison answered this argument in these words:

'If they (the Bill of Rights Amendments) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an inpenetrable bulwark against any assumption of power in the Legislature or Executive; they will be naturally lead to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'

I fail to see how courts can escape this sacred trust."

In the same book, page 110, Chief Justice Earl Warren speaking on "The Bill of Rights and the Military" is quoted as follows:

"One of the principal difficulties presented by these 'security risk' cases is the claim of necessity takes the form of an assertion of the right of secrecy. Thus the claim, by its very nature, tends to restrict the ability of the Court to evaluate its merit. This in turn impairs the efficacy of judicial review as an instrument for preserving the guarantees of the Bill of Rights. . . . I am one who believes firmly that the Court must be vigilant against neglect of the requirements of our Bill of Rights and the personal rights that document was intended to guarantee for all time."

Also, Justice William O. Douglas, in a lecture entitled "The Bill of Rights is Not Enough" is quoted as follows in the same book:

> Page 141: "Yet the judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of the people, the situation would be intolerable. But where wrongs to individuals are done by violations of specific guarantees, it is abdication for courts to close their doors."
>
> Page 149: "If the Bill of Rights were being written today, it would also encompass some of the recurring evils arising out of the vast exercise of authority through the administrative agency. . . . Moreover, traditional ideas of Due Process are not enough to put into harness the modern administrative agency, let alone the modern prosecutor, or the modern legislative committee."

In respect to the reduction of the number of frequencies from 23 to 7 for inter-station communication, the Court held that the decision called for consideration of highly technical factors and that it was in no position to rule that the respondent Commission acted arbitrarily and capriciously in making that selection. Petitioner asserts that the Court of Appeals side-stepped an issue which it should have decided on the evidence. If there wasn't any evidence, then the matter should have been remanded to the respondent for further proceedings. In Justice Frankfurter's

dubitante in *RCA v. U.S.*, 341 U.S. 412, he states on page 426 as follows (the issue was the issue of compatibility of two color TV systems):

> "Finally we are told that the Commission's determination as to the likely prospect of early attainment of compatibility is a matter within its competence and not subject to court review. But prophecy of technological feasibility is hardly in the domain of expertness so long as scientific and technological barriers do not make the prospect fanciful. In any event, this Court is not without experience in understanding the nature of such complicated issues. We have had occasion before to consider complex scientific matters."

---

2. WAS PETITIONER ENTITLED TO A PUBLIC HEARING?

The answer is clearly yes. Approximately 1,000,000 licensees had their operating time in inter-station communication reduced by approximately 23% and their channels of communication reduced from 23 to 7. In addition, petitioner asked for a hearing which was denied. 47 *U.S.C.* 303 (f), supra and 47 *U.S.C.* 316, supra, clearly entitles petitioner the granting of that request. See *ICC v. L & N RR*, 227 U. S. 88.

3. DID THE RESPONDENT COMMISSION ACT ARBITRARILY, CAPRICIOUSLY AND NOT IN THE PUBLIC INTEREST BY PROMULGATING RULES BASED ON EVIDENCE IN ITS FILES WHICH IT DID NOT MAKE A PART OF THE RECORD IN THE PROCEEDINGS?

The answer is clearly yes and the Court of Appeals should have so held. In *Chicago Junction Case,* 264 U.S. 258, Justice Brandeis stated on page 263:

> "Facts conceivably known to the Commission but not put in evidence will not support an order." (ICC case.)

In *U.S. v. Abilene & So. Ry. Co.,* 265 U.S. 274, 287-289, the Court held that the ICC cannot use material from its files to make findings of fact unless the same had been brought into evidence. The Commission cannot take judicial notice of all the facts in the documents in its files. Commission must introduce, by specific reference, such parts of the reports as it wishes to treat as evidence.

In *ICC v. L & N RR,* 227 U.S. 88, the Court states on page 93:

> "The Commission is an administrative body and even where it acts in a quasi-judicial capacity, is not limited by the strict rules of evidence, which prevail in suits between parties. . . . But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days."

In *U.S., Cincinnati & Columbus Traction Co. et al. v. B & O Southwestern RR Co.,* 226 U.S. 14, an ICC case, Justice Holmes stated on page 20:

"We remark that it is stated in the Commission's report that they base their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based on specific investigations made in the case without notice to them. (cases cited.) Such an investigation is quite different from a view by a jury taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases when its doing so is made to appear in the record, and the facts thus noticed are specified, so that matters of law are saved."

---

4. DID THE COURT OF APPEALS ERR IN DENYING PETITIONER'S MOTION FOR AN ORDER REQUIRING RESPONDENT COMMISSION TO PRODUCE THE ADDITIONAL EVIDENCE WHICH WAS NOT A PART OF THE RECORD?

The answer is clearly yes. Respondent Commission admittedly used evidence in promulgating the rules in question which it did not disclose to the public or the persons filing comments. No claim of national security had been made by the respondent Commission. Under the decisions cited in the discussion regarding issue Number 3, and particularly *ICC v. L & N RR,* 227 U.S. 88, supra, the Commission is not permitted to withhold the evidence.

5. FAILURE OF THE COURT OF APPEALS TO REVIEW THE SUBSTANTIALITY OF THE EVIDENCE.

The Court held on page 16 of its decision that it was not necessary for the respondent Commission to receive any evidence and that it followed therefore that the Court was not required to review the substantiality of the evidence.

Petitioner urges that the Court of Appeals should have determined whether the rule making was supported by substantial evidence. See *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474. Also *Boston & M. RR v. U.S.,* 373 U.S. 372, 202 Fed. Supp. 830; *RCA v. U.S.,* 341 U.S. 412. 5 *U.S.C.* 1009 provides in part as follows:

> (a) "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."
>
> (e) "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

6. BILL OF ATTAINDER.

Article I Section 9(3) of the *U.S. Constitution* provides that Congress shall pass no bill of attainder. Petitioner urges that the sanction and punishment provided in 47 *U.S.C.* 501 and 502 will be imposed on those unfortunate licensees by respondent Commission for acts judged by the said Commission to be violations of its rules. See generally:

U.S. v. Lovett, 328 U.S. 303;
Fleming v. Nestor, 363 U.S. 603;
Garner v. Board of Public Works of LA, 341 U.S. 716.

CONCLUSION

Petitioner urges that this Honorable Court grant its petition for a writ of certiorari on the basis of the foregoing.

Dated, Oakland, California,
July 10, 1967.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

DONALD M. SEA,
Of Counsel.

(Appendices "A", "B", "C" and "D" Follow)

Appendix "A"

United States Court of Appeals
for the Ninth Circuit

California Citizens Band Association, Incorporated, a corporation, Petitioner, vs. United States of America and Federal Communications Commission, Respondents.	No. 20,030

[March 7, 1967]

On Petition for Review of Orders of the
Federal Communications Commission

Before: Madden, Judge of the Court of Claims,
Hamley and Ely, Circuit Judges

Hamley, Circuit Judge:

This is a proceeding to review two orders of the Federal Communications Commission (Commission) affecting Class D radio stations in the Citizens Radio Service. Petitioner, California Citizens Band Association, Incorporated, is a non-profit California corporation. All of its members are Citizens Band Radio Clubs. The membership of each such club consists of

radio station licensees, duly licensed by the Commission to hold station licenses in the Class D Citizens Radio Service.

In one of the orders under review, released July 29, 1964 (29 FR 11099), the Commission adopted certain amendments to part 19 (now part 95) of the Commission's rules. In the other order, released on March 1, 1965 (30 FR 2706), the Commission, on reconsideration, adhered to its earlier determination. Both orders deal with the promulgation of rules affecting the Citizens Radio Service. The rules in question pertain, for the most part, to the kind of messages that may be transmitted, the frequencies that may be used, and the length of silent intervals between transmissions.

The Citizens Radio Service originated in 1945 when the Commission, after extensive inquiries and hearings, allocated a portion of the radio spectrum for a new "Citizens Radio-communication Service." This new service was primarily designed for both personal and business use by private citizens, particularly where other means of communication were not available. It was intended for essential, local communications such as those entailed in the operation of department stores, farms and construction projects. The first rules governing this Service were promulgated in 1947. In these rules, limitations on usage were kept at a minimum in order to foster development of the service.

When these rules were codified in 1949, certain prohibitions were set forth on the types of communi-

cations allowed in the Citizens Radio Service. Among other things, the codified rules provided that such stations be used only to communicate with other stations in the Citizens Radio Service; that all communications be limited to the minimum practicable transmission time; and that no station be used to carry communications for hire or in connection with radio broadcasting. In 1958, the Commission revised the rules and, among other things, established within the Citizens Radio Service, a new Class D, which was authorized to operate on certain frequencies in the 27 megacycle band.[1]

The Class D category of stations was created to fulfill an increasing need for short-distance voice communication by radio for personal or business use.[2] An ever-increasing number of applicants applied for Class

---

[1]In the Commission rules, the term Class D Citizens Radio Station was defined as follows:

"A mobile station in the Citizens Radio Service operating on an authorized frequency in the 26.96-27.23 MC frequency band with an authorized plate input power of 5 watts, or less, for radiotelephony only. (Class D stations are authorized to operate as mobile stations only; however, they may be operated at fixed locations in accordance with other provisions of this part.)" 23 FR 6132 (In somewhat modified form this definition is now contained in 47 CFR § 95.3[b].)

In 1959, the Commission also allocated 27.255 MC to be used by Class D stations on a shared basis with stations in other services (24 FR 1791). With this additional allocation, Class D stations were able to operate on twenty-three channels in the band.

[2]There are three other categories of stations in the Citizens Radio Service, denominated Classes A, B and C (47 CFR § 95.3 [b]). Each of these categories of stations has different kinds of authorized operations on different frequencies (47 CFR § 95.6). Class D stations, the only category of stations here in question, presently constitute more than ninety percent of the total number of Citizens Radio Service stations. Licenses for Class D, as well as all other classes of stations in the Citizens Radio Service, were to be issued for a term of five years.

D licenses.[3] Within a year, approximately 15,000 Class D station licenses had been granted.

On July 22, 1959, the Commission began a proceeding to amend its rules dealing with permissible communications in the Citizens Radio Service.[4] The Commission proposed several rule changes which, among other things, would limit the operation of the Class D stations (24 FR 6059-6060). Comments were invited on these proposed rule changes.

These proposed rules, adopted in a policy statement issued February 17, 1960 (25 FR 1408), reflected the Commission's intention that Citizens' radio communication be used primarily for intercommunication between units of a single station (intra-station), rather than for communication with other stations (inter-station). They also gave effect to the Commission's

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[3]The Commission attributes this growth to the sporadic long distance transmission characteristics of the 27 MC band, which enables a licensee, for hobbying purposes, to make contacts with other stations at great distances from his home base. Also, equipment for operation of a Class D station in this range of frequencies is cheaper and simpler than equipment for the other classes of citizens stations. Moreover, eligibility standards for Class D stations are low. An applicant is required only to be a United States citizen, eighteen years of age or older. No examination is required, nor does the applicant need any technical knowledge. See 47 CFR §§ 95.7; 95.13.

[4]In this notice of proposed rule making, reported in 24 FR 6059, the Commission stated that a considerable number of individuals may have been planning the operation of facilities in this service for the sole purpose of making random contacts with distant or unknown stations or for engaging in lengthy general discussions in more or less the manner which is customary in the Amateur Radio Service. The Commission expressed the view that such amateur-type operation, if engaged in to any extent, could result in intolerable interference with the operation of radio facilities in this service for short distance communications by radio directed to specific persons or stations on personal or business matters.

desire that the Citizens Radio Service be restricted to useful and substantial messages related to the business or personal activities of the individuals concerned.

Communications to random or unknown stations were prohibited. For the first time a duration on the length of communications was prescribed. The exchange of communications between two or more Class D stations (inter-station) was limited to not more than five consecutive minutes, followed by a two-minute silent period. This limitation did not apply to intra-station communications or to emergency communications. These rule amendments were made effective March 15, 1960. See 25 FR 1408-1411.

In November, 1962, the Commission initiated the proposed rule making which eventuated in the entry of the Commission orders here under review. See 27 FR 11500. Proposed amendments to Part 19 (now Part 95) were publicized and interested persons were invited to file comments on or before January 15, 1963.[5] In the accompanying notice the Commission stated that there were then approximately 350,000 Class D stations and that misuse of the Class D operating privileges had become so prevalent as to threaten the continued usefulness of the service. The Commission also stated in this notice that the proposed rule amendments were designed to make more apparent the permissible and prohibited communications and uses of citizens radio stations.

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[5]The time for filing comments was later extended to March 4, 1963.

In response to this notice over 2,500 comments, representing many divergent views, were received and considered by the Commission. No public hearings were held. On July 29, 1964, the Commission released its report and order adopting the new rules.[6] (29 FR 11099) A number of parties, including petitioner, requested reconsideration. In a memorandum opinion and order released on March 1, 1965, the Commission discussed and rejected requests for reconsideration of the order released on July 29, 1964. The Commission provided in this order that the amended rules would become effective on April 26, 1965.[7]

On April 19, 1965, Lafayette Radio Electronics Corporation petitioned the United States Court of

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[6]The orders under review promulgate numerous rule changes. Petitioner asserts that five of these changes modify existing Class D licenses in the following ways:

(1) The new rules for the first time reserve all but seven of the twenty-three frequencies available to Class D licensees exclusively for intra-station use (47 CFR § 95.41[d][2]).

(2) The operating time for Class D interstation communication is reduced from five minutes of operation and two minutes of silence, to five minutes of operation and five minutes of silence (47 CFR § 95.91[b]).

(3) The new rules for the first time prohibit Class D stations from communicating with other units beyond 150 miles (47 CFR § 95.83[b]).

(4) The new rules for the first time make an unincorporated association ineligible, with certain exceptions, to hold a Class D station license (47 CFR § 95.13[a], [b]).

(5) Under the new rules, a licensee of a Citizens radio station who is engaged in the business of selling Citizens radio transmitting equipment is now prohibited from permitting a customer to operate under his station license. All communications for the purpose of demonstrating such equipment must now consist only of brief messages addressed to other units of the same station. (47 CFR § 95.83[c]).

[7]As of April, 1965, there were more than 800,000 licensees in the Citizens Radio Service, with applications being filed at the rate of approximately 20,000 a month.

Appeals for the Second Circuit to review the Commission's above-described orders of July 29, 1964 and March 1, 1965. That court denied the petition on April 26, 1965, the same day the new rules became effective. *Lafayette Radio Electronics Corporation v. United States,* 2 Cir., 345 F.2d 278. On the same day California Citizens Band Association, Incorporated, filed the petition for review now before us.

Petitioner contends that some of the rule changes accomplished by the orders under review are invalid because they were adopted without first giving the notice required by law. The notice required to be given concerning the content of proposed rules is governed by 5 U.S.C. § 553(b)(3) (1966), formerly 5 U.S.C. § 1003(a)(3) (1964). It is there provided that notice of rule making shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[8]

Petitioner refers to three rule changes as having been made without compliance with the statutory notice requirement. The first of these is a change in 47 CFR § 95.1, "Basis and Purpose," formerly 47

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[8]Petitioner also cites 5 U.S.C. § 552(a) and (b) (1966), formerly 5 U.S.C. § 1002(a) (1964), in support of its notice argument. That statute, however, refers not to notice of rule making, but to the publication of information, rules, opinions, orders and public records.

With regard to the publication issue, petitioner also asserts that some of the rule changes in question were not published in the Federal Register as required by 5 U.S.C. § 552(a) and (b) (1966), formerly 5 U.S.C. § 1002(a) (1964), and are invalid for that reason. Petitioner is mistaken as to the lack of publication. As recited in the Editorial Note to Part 95—Citizens Radio Service, 47 CFR Part 95, the rule amendments were published in 29 FR 11099 et seq. on July 31, 1964.

CFR § 19.1. The only substantial change made in this rule is the inclusion of additional language in one sentence of the rule as presently worded, shown in italics in the margin.[9]

Petitioner does not indicate how it is aggrieved by the inclusion of this additional language in 47 CFR § 95.1. The added words ". . . all to the extent that these uses are not specifically prohibited in this part . . . ," merely state explicitly what was in any event necessarily implied in the former rules, and is implied in the new rules even absent this statement. Petitioner could not have believed that either the former rules or the new rules were designed to provide for service "specifically prohibited" in those rules. Thus the negating of any such design injects no new limitation.

The new clause ". . . service for the business or personal activities of licensees, . . ." makes reference to a limitation provision which was already in the rules, but which is now spelled out in greater detail in the "Basis and Purpose" clause of the amended rules.[10]

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[9]"These rules are designed to provide for private short-distance radio communications *service for the business or personal activities of licensees,* for radio signalling, for the control of remote objects or devices by means of radio; *all to the extent that these uses are not specifically prohibited in this part.*"

[10]Former paragraph (c) of 47 CFR § 19.61 (1963 Supp.) provided, with exceptions not here material, that no station in the Citizens Radio Service shall be used for the transmission of any communications or signals ". . . other than those concerning the business activities or personal affairs of the licensee, . . ." In the amended rules this limitation is restated in terms of prohibited uses, one such prohibited use being communications as a hobby or diversion, and another being communications which are "superfluous." See 47 CFR § 95.83(a)(1) and (10) (1966). Also, 47 CFR § 19.2(a) formerly provided that the Citizens Radio Service

The proposed rules which accompanied the notice of rule making did not show such a contemplated change in the introductory statement of "Basis and Purpose." However, other provisions of the proposed rules contemplated limitations on the use of Class D stations of the same general character (see proposed § 19.61, 27 FR 11503), and considerably more restrictive than those which were finally promulgated. See 47 CFR § 95.83 (1966).

Title 5 U.S.C. § 553(b)(3), formerly 5 U.S.C. § 1003(a)(3), does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule. *Willapoint Oysters, Inc. v. Ewing,* 9 Cir., 174 F.2d 676, 684-685; *Logansport Broadcasting Corp. v. United States,* D.C. Cir., 210 F.2d 24, 28. Petitioner argues that cases such as *Willapoint* are not here applicable because, unlike the rules there in question, the rules here under consideration carry criminal penalties. Proposed rules with criminal penalties, petitioner asserts, should be published in advance to afford certainty.

In support of this view, petitioner cites *Hotch v. United States,* 9 Cir., 212 F.2d 280, 282. However, in *Hotch,* neither notice that a regulation was to be issued, nor the proposed regulation itself, was published in the Federal Register at the time defendant

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was ". . . intended for personal or business radio communication, . . ."

The Commission had also previously stated in its policy statement, issued with the uncontested amended rules on February 17, 1960 (25 FR 1408), that it desired the Citizens service to be restricted to useful and substantial messages related to business or personal matters.

performed the prohibited act. 208 F.2d at 250. In the case before us, as noted above, other provisions of the proposed rules, in addition to previous policy statements published in the Federal Register (25 FR 1408), revealed the same general limitations as those adopted in the "Basis and Purpose" section of the newly adopted rules. Further, the new rules here in question were published in the Federal Register, 29 FR 11099 on July 31, 1964, and were subsequently published in 47 CFR § 95.1, et seq., as required by 5 U.S.C. § 552(a)(3) (1966), formerly 5 U.S.C. § 1002(a)(3).

Under 5 U.S.C. § 553(b)(3), quoted above opposite footnote reference 8, a notice of rule making is sufficient if it provides a description of the subjects and issues involved. The notice here in question amply describes, as one of the subjects and issues involved, the imposition of additional limitations upon the use which may be made of Class D stations. Since this is also the subject matter and issue dealt with in the language added to the introductory statement of "Basis and Purpose," as contained in 47 CFR § 95.1, the notice was sufficient with respect to that rule change.

On similar reasoning we also conclude that petitioner's contention that the notice of rule making was inadequate with regard to a change in the definition of "Citizens Radio Service," as set out in 47 CFR § 95.3(a), is without merit.

The third rule change which, petitioner argues, is invalidated by the lack of rule making notice, is the

inclusion, for the first time, of a definition of "man-made structure." 47 CFR § 95.3(c).

Under section 19.25(c), 47 CFR § 19.25(c) (1963 Supp.), the antenna of a Class D station could not ". . . exceed 20 feet in height above any man-made structure or natural formation on which it is mounted, except that when mounted on an existing antenna structure of another station the antenna shall not exceed the height of that antenna structure." The revised rule in 47 CFR § 95.37(c) (1966) states the same general rule in a slightly different way, not here contested.

However, the new rules do include for the first time a definition of "man-made structure." The term is defined in the new rules as: "Any construction other than a tower, mast or pole." 47 CFR § 95.3(c).

Petitioner asserts that this change in the new rules will in all probability have a serious effect on those Class D licensees who live in remote areas and consequently require greater antenna height to effectively operate their Class D radio equipment. We fail to see how this new definition, standing alone, could have such an effect on Class D operations.

Petitioner may have in mind some other rule change which utilizes this defined term in a manner which will produce such a detrimental effect on Class D licensees. However, petitioner makes no reference to a new rule of this kind, nor any contention that any such rule is invalid under the notice requirement. Nor does petitioner refer to any place in its petition

for rehearing in which it objected to the inclusion of this definition, and our examination of that petition fails to disclose any such objection. In view of these circumstances we are of the opinion that, insofar as petitioner is concerned, this rule change is not of sufficient consequence to require specific notice thereof prior to promulgation of the change.

Petitioner contends that since the new rules operate to modify outstanding Class D licenses in the respects listed in note 6 above, the Commission erred in promulgating such amendments without first conducting public evidentiary hearings.

The license modifications in question became effective on April 26, 1965, and immediately affected all Class D licenses then outstanding. Nevertheless, since such modifications were accomplished in proceedings applicable to the Citizens Radio Service in general, and were manifested by agency statements of general applicability and future effect, designed to implement, interpret and prescribe Commission policy, they constituted rules and were promulgated pursuant to rule making. See 5 U.S.C. § 551(4), (5) (1966).

The Administrative Procedure Act (APA), standing alone, does not require that a public evidentiary hearing be held as a part of rule making procedure. See 5 U.S.C. § 553(c) (1966).[11] Nor is there any con-

[11] As indicated by section 553(c), under such circumstances the APA only requires the agency to give interested persons an opportunity to participate in Rule making through submission of written data, views or arguments with or without opportunity for oral presentation. See *Superior Oil Company v. Federal Power Commission*, 9 Cir., 322 F.2d 601, 608-609. The Commission provided such an opportunity in the case before us.

stitutional requirement, under the Due Process Clause of the Fifth Amendment, or otherwise, for public evidentiary hearings in connection with such rule making. *Bowles v. Willingham,* 321 U.S. 503, 519; *Alaska Steamship Company v. Federal Maritime Commission,* 9 Cir., 356 F.2d 59, 61.

However, petitioner contends that two provisions of the Communications Act of 1934 (Act) require a public evidentiary hearing under the circumstances of this case. One of these provisions is section 316(a), added July 16, 1952, 66 Stat. 718, 47 U.S.C. § 316(a) (1964). It is therein provided that any station license may be modified by the Commission under stated circumstances. This section further provides that no such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefore,

> "... and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, *if requested,* why such order of modification should not issue: ..." (Emphasis added.)

The notice of rule making, released on November 16, 1962, invited interested persons to file comments on or before March 4, 1963. For all practical purposes this provided petitioner with an opportunity to show cause why the rule changes should not be made. Petitioner was aware of this notice and, in January, 1963, petitioner filed a seventeen-page comment with the Commission. In this document petitioner ex-

pressed its views concerning the individual proposals for rule changes. It also expressed its view that the rule making proceeding should be vacated, followed by a study of the general problem. In this connection petitioner stated that, in such a study, ample opportunity should be afforded all interested parties to be "heard" concerning the best way to gain the maximum use of the facilities by the most people.

Within a month after the Commission released the order of July 29, 1964, promulgating the new rules, the petitioner filed a petition for reconsideration in which it requested a "hearing de novo." At least two other parties also petitioned the Commission for a hearing subsequent to this initial order of modification. Since the modification order did not become final until the Commission denied these petitions for reconsideration on February 24, 1965, it is apparent that the Commission should have held a public hearing if section 316(a) was otherwise applicable to these circumstances.

The Commission argues, however, that section 316(a) is not applicable to the general rule making procedures here involved. It is uncontested that the Commission followed the procedures for general rule making set forth in the provisions of section 4 of the APA, 5 U.S.C. § 553 (1966). The Commission argues that this kind of proceeding, which does not provide for an adjudicatory hearing, is adequate where the promulgation of standards of general applicability is involved even where there may be a statutory right to an adjudicatory hearing before an individual application may be denied or a license modified.

In *United States v. Storer Broadcasting Co.*, 351 U.S. 192, the case which sets forth the broad principle upon which the Commission relies, the Supreme Court held that although section 309(b) of the Communications Act required a "full hearing" before denial of an application for a license, this did not withdraw from the Commission the rule making authority necessary for the orderly conduct of its business. 351 U.S. at 202-203.[12] The *Storer* doctrine was reaffirmed as recently as 1963 in *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33, in which the Supreme Court concluded that the "hearing" granted under section 4 of the APA, 5 U.S.C. § 553 (1966), was permissible under the general rule making requirements, even though a specific section of the Natural Gas Act would have allowed an adjudicatory hearing before an application could be rejected. 377 U.S. at 39-41.

Petitioner seeks to distinguish these cases on the ground that they involved applications for new licenses or for permission to engage in certain activities, as opposed to proposals to curtail existing licenses by taking away certain rights.

The most recent opinion in which this problem was considered is *American Airlines, Inc. v. Civil Aeronautics Board*, D.C. Cir., 359 F.2d 624. Although a provision of the Federal Aviation Act required an adjudicatory hearing before an aviation certificate could be modified, the court there held that since the regulation in question was general in nature, the cer-

[12]For a recent application of the *Storer* doctrine by this court and a description of the facts in *Storer*, see *Superior Oil Company v. Federal Power Commission*, 9 Cir., 322 F.2d 601, 610-613.

tificate holders were only entitled to the procedural protection afforded by a rule making hearing pursuant to section 4 of the APA. The court there specifically rejected the contention that the *Storer* doctrine is inapplicable to rule making proceedings in which outstanding licenses are affected.[13]

The court in *American Airlines* further stated that it was not there concerned with a proceeding that in form was couched as rule making, general in scope and prospective in operation, but in substance and effect individual in impact and condemnatory in purpose. Rather, the proceeding was rule making in both form and effect. Similarly, in the case before us, the Commission promulgated rules which are general in

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[13]The court said:

"Petitioners argue that the *Storer* doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the CAB regulation affected rights under existing certificates. That such a restrictive reading of the *Storer* doctrine is unwarranted, is shown by such decisions as National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943);[12] Airline Pilots Ass'n Intern. v. Quesada, 276 F.2d 892 (2nd Cir. 1960);[13] and Capitol Airways, Inc. v. CAB, 110 U.S. App.D.C. 262, 292 F.2d 755 (1961);[14] See also Transcontinental Television Corp. v. FCC, 113 U.S. App.D.C. 384, 308 F.2d 339 (1962).

"The present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases. However, the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making. [Footnotes omitted.]" 359 F.2d 628, 629.

nature and intended to affect all licensees in the same class equally.

The Commission also cites *Airline Pilots Ass'n. Internat. v. Quesada,* 2 Cir., 276 F.2d 892, for the proposition that no adjudicatory hearing is required in the case before us. In *Quesada* the Administrator of the Federal Aviation Authority had modified the rules affecting the outstanding certificates of airline pilots without giving each pilot the adjudicatory hearing to which he was entitled under the terms of a specific regulation. In upholding the general rule making procedure utilized by the Administrator, the court stated:

> "Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules,[7] the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected —here some 18,000—might demand to be heard individually. [Footnote omitted]." 276 F.2d at 896.

Similarly in the case before us it is apparent from a reading of the statute that its primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee. We therefore hold that the general rule

making procedure followed by the Commission was not violative of section 316(a) of the Act.

The other provision of the Communications Act of 1934, upon which petitioner relies, is section 303(f) of the Act, 48 Stat. 1082, 47 U.S.C. § 303(f) (1964), which authorizes the Commission to make necessary regulations to prevent interference between stations. That section contains the following proviso:

> "*Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with; . . .".

Petitioner argues that the provision of amended rule 47 CFR § 95.91(b), which requires Class D licensees to maintain five minutes of silence between each five minutes of communication with other Class D stations, as compared to two minutes of silence required under the former rules, constitutes a change in the "times of operation of any station. . . ," within the meaning of the above-quoted proviso. If this is true, the Commission was without authority to impose such a change effective as to then outstanding Class D licenses, during the terms for which such licenses were granted, without first holding a public hearing.

In order to determine whether this kind of change constitutes a change in "the times of operation of any

station," we have considered certain background facts. These facts are set out in the Commission's memorandum opinion which was released on March 1, 1965. The frequencies available to Class D stations may be used on a shared basis only (47 CFR § 95.5[a]). In practice, communications may be transmitted on a particular channel only when it is not already being used. The rules require licensees to cooperate in the use of frequencies so as to minimize interference (47 CFR § 95.5[c]). Class D stations may be operated at any time, day or night. No specific time period is assigned to this class of licensees. The new rules do not require a silent period between periods of intra-station communication, this limitation applying only to inter-station communications.

The Commission ruled, in its memorandum opinion and order on petitions for reconsideration, that the section 303(f) proviso, insofar as it relates to "times of operation," applies only to those cases where the Commission changes the basic license right. An example of such a change in the basic license right, according to the Commission, would be where, by regulation, it sought to decrease, by reference to total hours or times of day, the operation of a broadcast radio station which is presently authorized to operate from sunrise to sunset daily. The Commission expressed the view that the extension of inter-station silent periods of Class D stations, from two minutes to five minutes, did not invoke such a change in a basic license right, and was therefore not covered by the section 303(f) proviso.

We agree with the Commission's analysis of this statutory proviso and the question of its applicability here. The rule change in question, enlarging the silent period from two to five minutes in Class D inter-station communications, constitutes a relatively minor adjustment. In so concluding, we take note that the primary purpose of a clear Class D license is for intra-station communication. Minor changes in carrying on inter-station communications could not, therefore, be considered of sufficient consequence to entitle a Class D licensee to a public hearing under section 303(f).

However, this is not to imply that the Commission could make changes at will in Class D licenses without allowing a public hearing. A drastic change in the allowable operation of a Class D license could result in a judicial determination that a basic license right had been abused, entitling the licensee to a public hearing under section 303(f).

This silent period provision, along with other changes accomplished by the new rules, was designed to preserve the usefulness of the Citizens Radio Service as originally conceived. The former rules were amended in February, 1960 to make it clear that Class D stations licensed in the Citizens Radio Service were authorized "primarily to communicate with other units of the same station; . . ." and "secondarily" to intercommunicate with units of other stations in the Citizens Radio Service (25 FR 1411). The increase in the silent period between inter-station communications, while leaving without limitation intra-station

communications, served only to implement that pre-existing policy. See former 47 CFR § 19.61 (1963 Supp.). It did not, in the sense intended by section 303(f), change the "times of operation" of such stations.[14]

We hold that, at least as to petitioner, the Commissioner did not err in promulgating the rule amendments without first conducting public evidentiary hearings.

Petitioner argues that the rule revisions are not supported by a preponderance of the evidence before the Commission, and that the Commission erroneously resorted to outside sources of information. In this connection petitioner has moved for an order requiring the Commission to produce the "other evidence" upon which it relied in making its decision to amend the rules.

In support of its position that this court should review the substantiality of the evidence upon which the Commission based its decision, petitioner cites 5 U.S.C. § 706(2)(E) (1966), formerly 5 U.S.C. § 1009(e)(5) (1964). It is therein provided that the

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[14]Petitioner similarly contends that new rule 47 CFR § 95.41 (d)(2), for the first time reserving all but seven of the twenty-three frequencies available for Class D Citizens Radio Service exclusively for intra-station use, effectuated a change in the "frequencies" of such station, giving effect to the section 303(f) proviso requirement for a public hearing. However, we agree with the view expressed by the Commission in its memorandum opinion and order on petition for reconsideration that the change effectuated by this rule, affecting only inter-station communications, does not amount to a change in the frequencies of Class D licenses, but in use that may be made of sixteen of the assigned frequencies.

reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be ". . . (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title (formerly 5 U.S.C. §§ 1006 and 1007) or otherwise reviewed on the record of an agency hearing provided by statute; . . ."

Sections 556 and 557 do not apply to rule making except in cases where required, by some other statute, to be made on the record after opportunity for an agency hearing. See 5 U.S.C. § 554(c). As stated above, the rule making here in question was not required by any other statute to be so made.

Under these circumstances, and pursuant to 5 U.S.C. § 553(c), it was not necessary for the Commission to receive any evidence, as such, in this rule making proceeding. It was necessary only for the Commission to provide opportunity for, and consider, "written data, views, or arguments with or without opportunity for oral presentation," and this it did. See 1 Davis, *Administrative Law Treatise* §§ 6.01-.02. It follows that section 706(2)(E) does not entitle petitioner to request this court to review the substantiality of the evidence.

When, as here, a statute does not require that a particular kind of rule making be on a record made after a public hearing, the Commission is not confined to evidence presented in some formal manner. It may act not only on the basis of the comments received in response to its notice of rule making, but also upon

the basis of information available in its own files, and upon the knowledge and expertise of the agency. *Pacific Coast European Conference v. United States,* 9 Cir., 350 F.2d 197, 205. See, also, *American Airlines, Inc. v. Civil Aeronautics Board,* D.C. Cir., 359 F.2d 624, 629.

Accordingly, we deny petitioner's motion that the Commission be ordered to produce in this court the other evidence upon which it relied in making its decision to amend the rules.

Petitioner argues that the Commission acted arbitrarily, capriciously, and contrary to the public interest, in promulgating the amended rules. Petitioner specifies five respects in which, in its view, the Commission acted in this manner.

The first of these is the Commission's promulgation of the amended rules without first holding a public hearing. This general contention has been discussed and rejected above, and does not require further consideration.

The second point which petitioner urges under this heading is that the amended rules discriminate against those Class D licensees who desire to communicate inter-station. In this connection, petitioner asserts that the bulk of the Class D traffic in California and in most other areas is inter-station in character. Petitioner further asserts that five of the seven frequencies which, under the new rules, may be used for inter-station communications, are notoriously unreliable due to interference from other services and

from diathermy equipment, and due to placing four of these channels in consecutive frequencies.

The former rules provided that Class D stations were authorized "primarily" to communicate with other units of the same station. Such licensees were authorized to communicate inter-station "only when necessary" for the exchange of substantive messages related to the business or personal activities of the individuals concerned. See former 47 CFR § 19.61 (1963 Supp.). Thus if, as petitioner asserts, the bulk of Class D traffic at the time of the rule changes was inter-station in character, it is evident that there was then wide-spread abuse of then existing agency policy.

The Commission's memorandum opinion and order on petition for reconsideration recite in detail why, in the opinion of that agency, it was necessary to implement pre-existing policy against general use of Class D stations for inter-station communications, by reducing from twenty-three to seven, the number of frequencies which might be so utilized. This memorandum and order was published on March 3, 1965, in 30 FR 2706, and need not be summarized here. We conclude that the reasons there given are entirely adequate to support the rule changes designed to curtail inter-station use of Class D stations in keeping with pre-existing policy.

The selection of the seven frequencies which, under the new rules, could be used on a limited basis for inter-station communication, called for consideration of highly technical factors. We are in no position to

rule that the Commission acted arbitrarily and capriciously in making that selection.

Nor do we find any basis for holding that the new rules represent arbitrary and capricious action in the three other respects upon which the petitioner relies.[15] The general regulatory problem involved nearly five million transmitters licensed to over 1.4 million licensees in the Safety and Special Radio Services, the bulk of these being in the Citizens Radio Service. It was absolutely essential that the regulations governing such a vast activity be framed in general terms with a minimum of exceptions, provisos and other avenues for seeking case by case consideration.

If, in practice, a particular rule change proves to be incompatible with the over-all scheme of regulation, or unworkable under particular circumstances, individual licensees may seek a corrective rule amendment. These individual problems, however, are not matters appropriate for judicial consideration in proceedings to review the promulgation of general rules.

We hold that the Commission did not act arbitrarily and capriciously, but properly within the bounds of the authority conferred upon it, in classifying radio stations and prescribing the nature of the services to

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[15]These three particulars are as follows: (1) the limitations prescribed in the new rules apply nationwide without differentiation as to the varying problems of rural and metropolitan areas, (2) the new rules reduce antenna heights uniformly without taking into account the needs of different areas, and (3) the new rules strike the clause "and other purposes not specifically prohibited in this part," as contained in the former definition of Citizens Radio Service. See former 47 CFR § 19.1(a), and present 47 CFR §§ 95.1, 95.3(a).

be rendered by each class of licensed stations. See section 303(a) and (b) of the Act, 48 Stat. 1082, 47 U.S.C. § 303(a) and (b) (1964).

Petitioner contends that, in promulgating the new rules, the Commission violated section 326 of the Act, 48 Stat. 1091, 47 U.S.C. § 326 (1964), pertaining to censorship and impaired the First Amendment right of freedom of speech. Petitioner further argues that the new rules are unenforceable for vagueness. For the reasons stated in *LaFayette Radio Electronics Corp. v. United States,* 2 Cir., 345 F.2d 278, dealing with these same rule changes, we hold that the new rules are not invalid for any of these reasons.

The other arguments advanced by petitioner have also been considered and, in our opinion, are without merit.

Affirmed.

Appendix "B"

S
FCC 65-143
63456

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of Amendment of Part 19 (now Part 95) Citizens Radio Service, to revise Subpart D, Station Operating Requirements, and to make other changes.	Docket No. 14843 RM-252 RM-311 RM-312 RM-342 RM-347

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has under consideration its Report and Order (FCC 64-687) released July 29, 1964, in the above-entitled proceeding and the petitions for reconsideration and/or rehearing filed by the Lafayette Radio Electronics Corporation and Polytronics Laboratories, Inc., jointly; the California Citizens Band Association, Inc.; the National Association for Citizens Band Radio, Inc.; the Kanawha Valley Communications Club, Inc.; the Kyova Citizens Radio Club, Inc.; and by individual citizens radio station licensees. In addition to these six petitions,

which were timely filed, there were a number of informal letters and petitions, received by the Commission after the time for filing petitions for reconsideration had expired, both in support of and in opposition to the amendments to Part 95 as adopted in that Report and Order.

2. Briefly summarized, the principal allegations contained in the various documents are that the amendments: (a) are an unconstitutional abridgment of freedom of speech; (b) constitute censorship in violation of Section 326 of the Communications Act; (c) are unlawful by reason of their vagueness; (d) are arbitrary, capricious, and not in the public interest, primarily because of the failure to provide for hobby-type operations; (e) are in violation of Sections 303(f) and 316 of the Communications Act since Rules Section 95.41(d) constitutes a change in frequencies, and Rules Section 95.91(b) constitutes a change in the time of operation, during the license term without the hearing required by Sections 303(f) and 316 of the Act; (f) are in violation of the Fifth Amendment to the Constitution in that they deprive licensees of the full use of their property without procedural due process; and (g) are in violation of the Administrative Procedure Act since rule changes were adopted which were not contained in the Notice of Proposed Rule Making in this proceeding.

3. These rule making proceedings, under Section 4 of the Administrative Procedure Act, were initiated by the Commission with the issuance of a Notice of Proposed Rule Making, adopted November 14, 1962,

which was published in the Federal Register on November 22, 1962 (27 FR 11500). A period of over four months was afforded interested persons to file written comments in support of, or in opposition to, the proposed amendments. Over 2500 comments, representing many widely divergent views, were received and analyzed by the Commission prior to the adoption of its Report and Order in this proceeding. The authority for the rule changes adopted therein is contained in Sections 4(i) and 303, particularly paragraphs (a), (b), (f) and (g), of the Communications Act of 1934, as amended. On September 23, 1964, the Commission, by its Order (FCC 64-878), stayed the originally-scheduled November 1, 1964, effective date of the amendments until 30 days after its action disposing of the petitions now under consideration.

Freedom of Speech—Censorship

4. It is urged that the amendments adopted by the Report and Order, particularly Section 95.83, violate licensees' right to "Freedom of Speech", as guaranteed by the First Amendment to the Constitution. It is further urged that Section 95.83, and particularly subparagraphs (a)(1) and (13) thereof, constitutes censorship in violation of Section 326 of the Communications Act.[1] One petitioner states that:

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[1]This section provides: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

> "The right, we believe, to talk is one given to us by the Constitution. The Communications Act of 1934 says that no man may tell us what to say. That is one of the basic Americanisms, and we desire that this right be restored."

Another petitioner, referring specifically to Section 95.83(a)(1)[2] of the proposed rules, concedes that the Commission has the right to establish classes or categories of communications which may be transmitted on individual frequencies in specific services. However, it argues that:

> ". . . while the Commission can establish a category of communication authorized in any service, it cannot regulate the content of the communications which are authorized and it may not under the censorship provisions make value judgments as to the individual communications which may fall within the authorized category.
>
> * * *
>
> "It is clear . . . that the proposed prohibition on communications which are part of a 'hobby' or 'are intended for diversion' constitutes the attempt to censor personal communications in violation of Section 326. It is clear that so long as a communication is a personal communication, it is beyond the power of the Commission to control the contents of the message or to control the motive which stimulates the licensee to transmit the communication . . . The purpose for which a licensee communicates with an authorized receiver is beyond the regulatory power of the

[2]That section prohibits licensees from ". . . engaging in radio communications as a hobby or diversion, i.e., operating the radio station as an activity in and of itself."

> Commission, so long as it is a genuine communication intended to communicate intelligence to specific persons or a specific station."

With respect to proposed Section 95.83(a)(13),[3] it is urged that:

> ". . . there is no basis for prohibiting the discussion of radio equipment even if the equipment is part of a hobby. The prohibition is a clear violation of Section 326 in that it seeks to regulate the content of an otherwise authorized personal communication."

5. After thorough consideration, the Commission has concluded that it cannot adopt the views urged by the petitioners. In consideration of petitioners' arguments, it is appropriate to set out certain background information concerning the various Safety and Special Radio Services, including the Citizens Radio Service. The latter is one of over 40 Safety and Special Radio Services regulated by the Commission. These 40-odd services represent almost all of the non-government use of radio other than Broadcast or Common Carrier. The communications systems provided for are indispensable to present day society and industry. They are essential in providing communications in every conceivable enterprise and activity. Local governmental agencies and depart-

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[3]This section prohibits licensees from ". . . transmitting communications to stations of other licensees which relate to the technical performance, capabilities, or testing of any transmitter or other radio equipment, including transmissions concerning the signal strength or frequency stability of a transmitter, except as necessary to establish or maintain the specific communication."

ments, transportation complexes, all forms of industry (heavy and light), sales, manufacturing, distribution, and so on, all have keyed many of their processes to the unique communication capabilities of radio. In addition, radio serves many personal and non-business uses.

6. As of July 1, 1964, there were nearly 5 million transmitters licensed to over 1.4 million licensees in the Safety and Special Radio Services. Yet, despite the recognized value of the radio communication systems provided for, less than 50 Mc/s of the 865 Mc/s between 25 Mc/s and 890 Mc/s are exclusively available for such radio services. It is manifestly impossible to assign frequencies for the exclusive use of each of the licensees. In order to provide for the widest and most effective use of the limited spectrum space available, channels have not been assigned on an exclusive basis but upon the basis of shared use by individual licensees. All licenses issued are predicated on this principle. This is in striking contrast to the Broadcast Services and most of the Common Carrier radiocommunications services where the privilege of exclusive use of a discrete frequency within a given area may be assigned to a single licensee. Existing requests for the frequency space in the Safety and Special Radio Services, many of them meritorious, far exceed capabilities of the available frequency space. In order to fulfill its statutory obligation generally to encourage the larger and more effective use of radio in the public interest, as the Commission is required to do under Section 303(g) of the Act, it has been

necessary for the Commission to establish priorities, limit eligibility to hold radio station licenses, and restrict the use of stations in these services to specified purposes and types of communications which will be the most beneficial to the public and assure the most effective uses of this very limited frequency space.

7. Section 303 of the Act sets forth the general powers of the Commission. Among other things, it authorizes the Commission, as the public convenience, interest, or necessity requires, to (a) classify radio stations, and (b) prescribe the nature of the service to be rendered by each class of licensed station and each station within any class. Pursuant to this authority, the Commission has created the various Safety and Special Radio Services; each to fulfill or serve a specific communication need. Thus, for example, the Aviation Radio Service was created to fulfill the radiocommunication needs in controlling air traffic and related aviation needs; the Marine Radio Service to meet the communication needs of ships and vessels; the Police Radio Service to serve law enforcement agencies; the Fire Radio Service to serve fire departments; the Motion Picture Radio Service to serve the motion picture industry; the Manufacturers Radio Service to serve manufacturing industries; the Railroad Radio Service to provide radiocommunication service for railroads; the Taxicab Radio Service for taxicabs; the Automobile Emergency Radio Service to dispatch expeditiously repair or tow vehicles to disabled automobiles, etc. In each of these categories, both initial eligibility for license

and the type of communications permitted are specifically spelled out, defined and limited.

8. A relative newcomer to the services provided for under Commission rules, the Citizens Radio Service was created to provide individuals with a needed communications tool for the transmission of messages which are necessary for the conduct of a business or personal activity. With the intensive use now being made of a very limited radio spectrum, the impossibility of accommodating thousands of potential new users and uses, the continual expressions of urgent need for radio facilities within the sevices devoted to such important areas as public safety, transportation, large and complex industrial processes and the like, it is unthinkable that the Commission cannot require efficient operational techniques which will limit communications and thus "time on the air" to the extent necessary to accomplish the purpose to be served.

9. In exercising its authority and responsibility to "prescribe the nature of the service to be rendered," the Commission may either specify the types of communications which are permissible, or, conversely, those which are prohibited. The degree of specificity in spelling out the limitations on communications vary as the particular situation and needs in each service warrant. Thus, for example, stations in the Local Government Radio Service are authorized simply "to transmit communications essential to the official activities of the licensee" (Section 89.253), while the permissible communications in the Manufacturers Radio Service are more severely limited

and detailed as follows: ". . . except for transmissions relating to an immediate emergency involving the safety of life or property, such authorized stations may be used only for the transmission of communications incident to plant security, production control or materials-handling, other than the retail distribution of the manufacturer's products." (Section 91.728) A manufacturer licensed in the Manufacturers Radio Service, even though he may have a legitimate business need for radio communications in connection with the retail distribution of his manufactured products, may not use his radio station for that purpose but must obtain a license for such use in some other service such as the Business or Citizens Radio Services which are comparatively less restricted. Another example of detailed limitations on the nature of the service which may be rendered by a radio station is contained in Section 87.257 of the Aviation Services rules which provides, in part, that "Aeronautical advisory stations shall not be used for air traffic control purposes" and "Communications on the frequency 122.8 Mc/s shall be limited to the necessities of safe and expeditious operation of private aircraft, pertaining to the conditions of runways, types of fuel available, wind conditions, weather information, dispatching or other necessary information: *Provided,* however, That on a secondary basis, communications may be transmitted which pertain to the efficient portal-to-portal transit of which the flight is a portion, such as requests for ground transportation and food or lodging required during transit."

10. The adoption of Section 95.83, Prohibited Uses, which delimits the nature of the service to be rendered by citizens radio stations is within the scope of the Commission's duties and regulatory powers under Section 303 of the Act to prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class. In *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943), the Supreme Court of the United States considered the question of the authority of the Federal Communications Commission to make regulations under Section 303 of the Act in light of a claim that the Commission's chain broadcasting regulations were an unconstitutional abridgment of freedom of speech in violation of the First Amendment to the Constitution. The ruling of the Supreme Court is applicable and pertinent to the case at hand. The Court stated that:

> "The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication . . . the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." (Underlining supplied)

and further:

> "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest."

Then, turning specifically to the question of freedom of speech, the Court stated:

> "Freedom of utterance [speech] is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

It is concluded, therefore, that Section 95.83 of the proposed rules does not constitute an abridgment of freedom of speech as guaranteed by the First Amendment.

11. Similarly, we conclude that the adoption of Section 95.83 does not violate the proscription against censorship contained in Section 326 of the Communications Act when that section is read and construed in the light of the Commission's duties and authority under Section 303(a) and (b) of the Act. In complying with the statutory mandate of Section 303, the Commission has, from the inception of the various Safety and Special Radio Services, classified the numerous types of services and established reasonably related limits on permissible communications. As indicated above, many of these have been in specific detail. All, of course, have been predicated upon a determination by the Commission that the public convenience, interest, or necessity would be served thereby. These actions have been based upon the uncontrovertible fact that there is not enough radio spectrum space to accommodate all those who desire to use radio and that the present demands far exceed the available frequency space. In the Safety and

Special Radio Services, we have provided that the very limited frequencies available to stations in the various services must be used on a shared basis and such use must be limited to those purposes and communication which are the most deserving and needful of the valuable frequency space involved.

12. Finally, the argument is not understood that, although the Commission may establish categories of service, it may not make a determination as to the kinds and types of communications which fall within the authorized categories. The establishment of a category without a determination of the composition of the traffic would result in virtually no regulation and an abdication by the Commission of its congressionally-imposed responsibilities. This would result in endless chaos and confusion—the very result which the Commission was established to prevent. In any case, the ruling of the Supreme Court in the NBC case, above, that the burden is placed upon the Commission to determine the composition of the radiocommunications traffic is dispositive of that argument.

Vagueness

13. It is next urged that proposed Section 95.83 (a)(1) is so vague that a licensee cannot reasonably understand which communications are authorized and which are prohibited. This section prohibits the use of a citizens radio station:

> "For engaging in radiocommunications as a hobby or diversion, i.e., operating the radio station as an activity in and of itself."

One petitioner states:

> "The control of communication cannot be made by rules which are so vague as to make it almost impossible to ascertain the circumstances to which they apply. Where constitutionally valid conditions are imposed on speech by governmental authority, the standards by which one is required to act must be stated in such a way as to be clearly ascertainable . . . the fact that it is difficult to write clear standards does not make valid otherwise invalid regulation. The burden is on the governmental authority to meet the constitutional requirements."

14. Admittedly, it is difficult to delineate within the context of a precise rule between permissible and non-permissible communications and it is patently impossible to mention in the rules all conceivable circumstances in which a communication will constitute a valid—or invalid—use. While the rules must be broad enough to cover every situation, they need not specifically mention or list every conceivable circumstance or situation which is permitted or prohibited. To do so in this case, even if it were possible, would unduly lengthen and complicate the rule because of the wide variety of permissible uses intended to be served by the Citizens Radio Service. The instant rules are written to permit the widest possible use consistent with the public interest and one purpose of the proposed amendments was to indicate which uses are prohibited. The crux of the matter at issue here is whether the prohibited uses contained in the rules are sufficiently explicit to provide guidance for

licensees in this service. What is required, then, is that the rule be sufficiently clear so that the average prudent person can understand what is required. The instant rules meet this standard.

15. In addition, the rules do not materially change the prohibited uses in the Citizens Radio Service which have been an integral part of the service since its inception. Nor has this information been hidden from licensees. Each applicant for an authorization in this service literally certifies on the application form that he has read the applicable rules and understands them. In substantially every case for the past several years, a bulletin has been sent to each licensee with his authorization advising of the permissible uses in this service. Numerous public notices and bulletins have been issued concerning the permissible and prohibited uses of citizens radio stations. Also, there have been several decisions by the Commission concerning the question of prohibited use in this service.[4] Thus, as was implicit in the Report and Order in this proceeding, these rules have an ascertainable meaning for licensees who are making a good faith effort to

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[4]See: Report and Order, Amendment of Part 19, Citizens Radio Service, Docket No. 12987, FCC 60-134, 25 F.R. 1408 (Feb. 17, 1960), 19 Pike and Fischer RR 1548; Memorandum Opinion and Order, Amendment to Part 19, Citizens Radio Service, Docket 12987, FCC 60-515 (May 9, 1960), 19 Pike and Fischer RR 1554; *Warren G. Holleman*, Docket No. 14210, FCC 63-45 (Jan. 16, 1963), 34 FCC 121, 23 Pike and Fischer RR 539; and *Vincent R. Banville*, FCC 63-1004 (Oct. 30, 1963), 35 FCC 604. In addition to these, there have been hundreds of other decisions in individual cases where we have either issued an Order of Revocation or Memorandum Opinion and Order in a forfeiture case. Public Notices of the enforcement action taken by the Commission are regularly mailed to many citizens radio clubs.

comply with the purposes and intent thereof. Experience over the past several years has shown that the majority of licensees in this service do understand the meaning of the rules. Moreover, the many letters and comments received in this proceeding do not indicate any widespread misunderstanding of the intended thrust of the prohibitions.

16. Thus, from its inception, the Commission has repeatedly emphasized that, although a citizens radio station may be used for necessary communications in connection with a hobby activity, such as boating, hunting, hiking, etc., the operation of the station may not itself constitute the hobby activity. It has always been a basic concept that use of a citizens radio station must be limited only to those communications essential to some business or personal activity of the licensees in which the unique attributes of a radiocommunications system for conveying useful, necessary and meaningful information between points otherwise without a communication link is either indispensable or obviously advantageous. But that kind of use is clearly distinct and separate from using the radio station facility as a hobby or diversion in and of itself. And it is the use of these radio stations for hobbying and/or amusement purposes or where the transmissions evidence no communications usage essential to some personal or business activity of the licensee that has been determined not to be in the public interest.

17. The prohibited use of these radio stations has fallen into a perceptible pattern which can be readily

identified. Extensive monitorings have disclosed, typically, not isolated expressions or statements, but rather that a substantial amount of time is used during the course of an exchange of transmissions in engaging in operations which clearly fall within the prohibitions of Section 95.83(a)(1).[5] Illustrative of the types of communications which evidence a use of radio as a hobby or diversion, but certainly not all inclusive, are the following:

(a) "You want to give me your handle and I'll ship you out a card the first thing in the morning;" or "Give me your 10-20[6] so I can ship you some wallpaper." (Communications to other licensees for the purpose of exchanging so-called "QSL" cards.)[7]

(b) "I'm just checking to see who is on the air."

(c) "Just calling to see if you can hear me. I'm at Main and Broadway."

(d) "Just heard your call sign and thought I'd like to get acquainted;" or "Just passing through and heard your call sign so I thought I'd give you a shout."

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[5]It is to be noted that various other subsections of 95.83 contain specific prohibitions which are closely akin to those which are characterized as hobbying. Discussion here is limited to the use of the radio station as a hobby or diversion which come within the prohibitions of Section 95.83(a)(1).

[6]This is part of the so-called "10 Code" system used by many radio operators and refers to the location of the stations communicating.

[7]This is derived from the so-called "Q" code based upon the regulations accompanying the International Telecommunications Convention and used extensively in the Amateur Radio Service. It is code for "Can you acknowledge receipt?", "I am acknowledging receipt." It is being used in the Citizens Radio Service where a substantial number of "hobbyists" collect cards from licensees whom they have contacted.

(e) "Just sitting here copying the mail and thought I'd give you a call to see how you were doing." (Referring to an intent to communicate based solely on hearing another person engaged in the use of his radio.)

(f) "My 10-20 is Main and Broad Streets. Thought I'd call so I can see how well this new rig is getting out."

(g) "Got a new mike on this rig and thought I'd give you a call to find out how my modulation is."

(h)"Just thought I would give you a shout and let you know I am still around. Thanks for coming back."

(i) "Clear with Venezuela. Just thought I'd let you know I was copying you up here."

(j) "Thought I'd give you a shout and see if you knew where the unmodulated carrier was coming from."

(k) "Just thought I'd give you a call to find out how the skip is coming in over at your location."

(l) "Go ahead breaker. What kind of a rig are you using? Come back with your 10-20."

18. There is one other matter which should be considered. Experience over a period of several years shows that, in a large number of cases, licensees who have been found to be in violation of this rule have, at some time in their exchange of communications, also transmitted communications which are permissible under the rules. However, typically, the great majority of the time involved in such exchange has been for hobbying activities. It is emphasized that

such an intermixture of permissible communications with prohibited communications cannot justify the transmission of prohibited communications.

19. For the reasons set forth above, the contention that the rules are invalid because of vagueness is rejected. However, to the extent that it will be helpful and serve to clarify what is meant in Section 95.83 (a)(1), that section of the rules is being amended by inserting a note which contains illustrations of the types of communications which are prohibited. These examples are illustrative only but will provide ample guidance. It is also pointed out that, under applicable rules and regulations, formal enforcement action is based upon repeated violations (except where wilfulness is involved). Thus, the licensee is first warned as to the operations which are considered to be in violation of the rules and given an opportunity to bring his operations into compliance with the rules. In this first warning, excerpts from the objectionable transmissions are furnished the licensee for his guidance and information, and formal action may thereafter be instituted if a repetition of the same offense should occur.

Hobbying and the Public Interest

20. Apart from the allegations that the rules prohibiting the use of radio stations in this service as a hobby or diversion are illegally vague, some of the petitioners requested that the Commission reconsider the matter and permit hobby use. Generally, their arguments are based upon the large number of licen-

sees now authorized; that many purchased their equipment because they had been led to believe that hobby use was permissible; that hobby use generates goodwill, friendship and comradeship; that hobby use has contributed to the general well-being of our national economy because of increased sales of the radio equipment used in the Citizens Radio Service; that such use harms no one; etc. One petitioner requested that the Commission establish an examination-free, hobby-type service using the frequencies assigned for the Citizens Radio Service.

21. All of these matters were considered by the Commission in its Report and Order in this proceeding. No new arguments have been advanced and, upon reconsideration, the earlier determination is affirmed. However, we consider it useful to spell out again some of the considerations upon which the determination was predicated.

22. As was made clear in the Report and Order in this proceeding, Section 95.83 does not impose any substantial new restrictions on the use of citizens radio stations. The Citizens Radio Service was created to provide a needed communications tool for the average citizen for the transmission of messages which are necessary for the conduct of a business or personal activity. As such a communications tool, a citizens radio station can provide useful and worthwhile communications service, particularly where other forms of communication are not available, such as while in transit or in the absence of landline telephones. The use of citizens radio stations for oper-

ation as a hobby in and of itself has never been permitted. Despite this fact, hobby-type uses involving communication between stations of different licensees is prevalent on all citizens band frequencies to the substantial detriment of the legitimate users and in contravention of the primary purpose of the service, which is to provide radio communications between units of the same station. The serious detriment imposed on use of the service for its intended purposes by illegal operations of this character is attested to by the support for the Commission's position from those persons who have been frustrated in their attempts to use the service for its intended purposes.

23. Undoubtedly any provision in the rules which would sanction hobby-type operation in the Citizens Radio Service similar to that now provided in the Amateur Radio Service but without the examination now required in the Amateur Radio Service would result in a vast increase in the number of citizens radio licensees. However, the limited frequency space available for use by citizens radio stations is simply not sufficient to permit hobby-type operations in this service.[8] There are only 23 frequencies available for use by the almost 700,000 existing Class D station licensees and all these frequencies are needed to fulfill

[8]The Commission again points out that those persons who consider radiocommunication, *per se*, as an important hobby element in their activities may become amateur radio station licensees by passing the required examination. Although the Amateur Radio Service is not established for "hobby" communications purposes as ends in themselves, neither are such communications prohibited.

the needs of present and future[9] licensees using the service for a communications tool as originally intended. The possibility of taking advantage of the gains in useful spectrum space to be obtained from single side band equipment has been considered; however, that possibility does not alter this conclusion. The question of reallocating additional frequency space to the Citizens Radio Service for hobby-type use is not before the Commission in this proceeding.[10] Therefore, any hobby-type use of the citizens radio frequencies can only be at the expense of the purposes for which the service was created. Hobby-type use, by its very nature, generates lengthy and unnecessary use of the frequencies. Citizens radio station licensees desiring to use their stations for legitimate purposes have often found the frequencies being used for discussions of equipment, signal reports, exchanges of QSL cards, or other similar conversations. In addition, licensees monitoring the frequencies for transmissions from their own units are subjected to listening to extensive idle chatter generated by a desire to

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[9] Although there are conflicting opinions in this area, it is noted that a number of the manufacturers and dealers of citizens radio equipment have stated that they expect an increase in the demand for station equipment after the adopted rules become effective. While this question is somewhat speculative, it appears to us that, while the number of licensees in this service may not increase as spectacularly as in the past, the service will continue to have a healthy growth.

[10] A petition, RM-661, has been filed by the American Citizens Band Association, Inc. requesting the allocation of frequencies for this purpose. Another petition, RM-406, filed by the International Crystal Mfg. Co., Inc. requests the creation of a new "hobby-class" license in the Amateur Radio Service. Action on these petitions will be taken by the Commission in another proceeding at a future date.

use citizens radio as a diversion. The many thousands of licensees, operating in accordance with the limitations on use, deserve to have their equipment investment protected from operations which are often in open disregard of the Commission's rules and the basic concepts of the use of the service. The Commission considers that, as between the two types of uses, operation as originally limited in the rules provides the most productive and worthwhile use of the frequencies, and that the public interest is served thereby.

24. As indicated, a number of licensees have asserted that they were misled into believing that hobby-type communications were permitted by the advertising of some equipment manufacturers or dealers, and by articles appearing in various publications. While this Commission has no direct control over the advertising of the equipment manufacturers and dealers, nor over the contents of articles appearing in publications, it has gone to great lengths to make available to the interested public accurate information. Literally hundreds of thousands of copies of informative material have been distributed. Numerous bulletins and public notices describing the basic limitations on use of the Citizens Radio Service have been mailed to applicants and licensees as well as publishers and advertisers. A copy of a bulletin, which clearly states that hobbying is prohibited, has been sent with virtually every Class D station license issued. Further, every applicant is required to certify that he has a current copy of the rules, and in recent

years, to certify that he has read and understood the rules and will operate in compliance therewith. Public Notices of the enforcement actions taken by the Commission against hobbyists are regularly mailed to many citizens radio clubs. Thus, the means of ascertaining what is permitted are available, and applicants and licensees must accept the responsibility of informing themselves of the Commission's rules and their application to the communications use proposed to be made of their stations.

Hearing Requirements

25. Lafayette and Polytronics, in their joint petition, argued that the amendment to Section 95.41(d) of the rules would change the frequencies available to their Class D citizens radio stations and that proposed Section 95.91(b) would change the times of operations of their stations. Accordingly, they urged that Section 303(f)[11] of the Communications Act requires the Commission to obtain either the consent of the licensees or afford them a hearing before the rule amendments may become effective. They stated that

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[11]Section 303(f) reads: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve the public necessity, or the provisions of this Act will be more fully complied with;"

they do not give their consent and they have requested a hearing. Other petitioners also have requested a hearing.

26. The Commission has concluded that the proposed amendment of Section 95.41(d) would not change the frequencies available to the petitioners and that proposed Section 95.91(b) would not change the times of operation of the petitioners' radio stations within the meaning of Section 303(f) of the Act. In any event, even were we to assume, for the purpose of argument, that there has been a change in frequencies and times of operation, a hearing is not required in this case because there are no substantial and material questions of fact presented by the pleadings on these questions but only matters of law and policy.

27. Section 95.41(d), currently in effect, lists 23 frequencies that are available to Class D radio stations in the Citizens Radio Service. In this service, specific frequencies are not assigned to any Class D radio station. Instead, under the current rules, all Class D radio station licensees are permitted to operate on any of the 23 frequencies, primarily for communications with units of the same station and, secondarily, for communications with other Class D stations. All these frequencies are available on a shared basis with other stations in this service so that all operations on these frequencies are subject to interference from other licensed Class D citizens radio stations. Under the amendment to Section 95.41(d), the same 23 frequencies would still be available to all

Class D radio stations. But a new limitation on the use of some of these frequencies would be imposed, in that communications between different licensees would be restricted to 7 specified frequencies. Since all 23 frequencies continue to be available for the primary purpose of this service, viz., communication between units of the same station, this change in usage does not constitute "changes in the frequencies" available to any Class D stations within the meaning of Section 303(f).

28. With respect to the argument concerning changes in the times of operation of Class D radio stations, it should be reiterated that the frequencies available to these stations are available for use on a shared basis only. In practice, communications may be transmitted on a particular channel only when it is not already being used. Further, the rules (Section 95.3) require licensees to cooperate in the use of frequencies so as to minimize interference and thereby obtain the most effective use of their stations. Class D stations may be operated at any time, day or night. No specific time period is assigned to Class D radio stations as is the case with certain other classes of stations, such as some radio broadcast stations and some common carrier stations. Therefore, Section 95.81(f) of the current rules provides, with some exceptions not pertinent here, that Class D radio stations engaged in interstation communications may be operated continuously for a maximum of 5 minutes and that each exchange of communications is to be followed by a silent period of 2 minutes. New Section

95.91(b) would not change the time within which Class D stations may be operated (they may still be operated at any time during the 24 hours per day), nor would it change the 5-minute limitation on the length of transmissions. The only change would be in the length of the required silent period, from two minutes to five minutes. In our view, this change is not a change in the "times of operation" within the meaning of Section 303(f). Stated otherwise, we think that the provision in 303(f) concerning "times of operation" applies to those cases where the Commission changes the basic license right, e.g., a licensee's authorization to operate his station during specified periods of the day, (for example, a broadcast radio station authorized to operate from sunrise to sunset daily).

29. In any event, even if we assume for purpose of argument, that the amendments of Sections 95.41 (d) and 95.91(b) would change frequencies and times of operations, a hearing is not required in this case. The proceedings here conducted afforded ample opportunity to the petitioners, and to all interested persons, to supply information and views on the proposed amendments. The limitations on interstation communications and on the length of the silent period were included in the Notice of Proposed Rule Making. Information and comments thereon were submitted by a substantial number of persons and were considered by the Commission in reaching its decision. The petitioners have raised no factual issue that requires an evidentiary hearing for resolution. Thus,

since there are no substantial or material questions of fact presented by the pleadings that could not be and were not resolved as a matter of law in the Report and Order, a hearing is not required.[12]

30. We note that the foregoing conclusions are in line with the practicalities of the situation. For, it would be impracticable, if not impossible in this case, either to obtain the individual consent of each citizens radio licensee or to afford him an opportunity to participate in evidentiary hearings. There are now almost 700,000 Class D radio station licensees in the Citizens Radio Service. The amended rules affect all of these licensees. We see no reasonable alternative to the procedure followed in this case, and to postpone the effectiveness of the rules long enough so that they would not affect existing licensees during the terms of their licenses would frustrate, rather than accomplish the objectives sought to be attained by this rule making proceeding. Since citizens radio station licenses are issued for 5-year terms, the effective date of the rules would have to be postponed for at least 5 years. The limitation on the use of the frequencies for interstation communications and the length of the silent period are considered by the Commission as vital to the preservation of the usefulness of the Citizens Radio Service. Thus, these limitations, which the Commission found to be in the public interest, would remain ineffective for 5 years while the deteri-

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[12] *Capitol Broadcasting Co. v. F.C.C.*, 116 U.S. App. D.C. 370, 324 F. 2d 402 (1963); and *Pan American Petroleum Corp. v. F.P.C.*, 116 U.S. App. D.C. 249, 322 F. 2d 999 (1963).

orating situation in the service would not only continue but would grow to chaotic proportions.

31. Finally, one petitioner argued that, even if the limitation on the use of frequencies for interstation communications "be viewed as a change in the type of communication which is authorized rather than a change of frequency, a hearing is required" under Section 316 of the Act. This petitioner did not, however, present any substantial or material questions of fact. For the same reasons set forth above concerning a hearing under Section 303(f), we believe that a hearing under Section 316 is not necessary. If this petitioner intended to argue that we have changed the nature and content of the permissible communications on these frequencies, that argument also is rejected. Under new Section 95.41(d), the types of permissible communications that may be transmitted have not been changed materially, as we have indicated above. The revised rules merely spell out prohibitions which have been an integral part of the Citizens Radio Service since its inception.

32. For the foregoing reasons, the requests of the petitioners for hearings on these matters are denied.

Fifth Amendment

33. It has been asserted that the rule changes are in violation of the Fifth Amendment to the Constitution. But a citizens radio station license does not convey any property rights to the licensee. The privileges granted by the license are by the very terms of the license itself made "[S]ubject to the provisions of the

Communications Act of 1934, as amended, subsequent acts, treaties, and all regulations heretofore or hereafter made by the Commission . . ." (Underlining supplied). Despite allegations by a petitioner to the contrary, the amended rules were adopted after procedures in complete accordance with the requirements of Section 4 of the Administraive Procedure Act which affords all licensees their procedural rights under due process.

Administrative Procedure Act

34. As noted above, these amendments were adopted in accordance with the procedural requirements of Section 4 of the Administrative Procedure Act. Briefly, the requirements of that section may be summarized as follows:

(a) Notice: General notice of proposed rule making must be published in the Federal Register which must include (1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subject and issues involved.

(b) Procedures: Procedures must afford interested persons an opportunity to participate through submission of written data, views, or arguments with or without opportunity to present them orally in any manner. Sections 7 and 8 of this Act (5 USC 1006 and 7), which relate to hearings and decisions, do not apply to this proceeding (see previous discussion).

(c) Effective Dates: Except for good cause shown, the required publication of the adopted rule be made at least thirty days prior to the effective date.

All of these requirements have been met.

Miscellaneous Arguments

35. One petitioner asserts that the amendment to Section 95.1 is not valid because no change to that section was proposed in the Notice of Proposed Rule Making in this proceeding. However, Section 4(a) does not require the notice to contain the specific language of each amendment. The Commission is not limited to the action tentatively proposed in the notice of proposed rule making but may also consider and adopt counter proposals or other proposals falling within the general purview of its published notice. Adequate notice is given when the Commission clearly puts interested persons on notice of the general subject matter to be considered. It is enough that the notice contains the "substance of the proposed rule or a description of the subject and issues involved." The notice must be sufficiently informative to alert interested persons and allow them to participate in the rule making process. All of the rule changes adopted by the Report and Order were within the general subject and purpose of the notice and interested persons were given an entirely adequate opportunity to become aware of the issues under consideration, namely, clarification of the permissible and prohibited uses, particularly with respect to the prohibition

of hobby-type communications. The change in Section 95.1, Basis and Purpose, was consistent with other specific proposals contained in the notice and was actually adopted in lieu of more detailed limitations on permissible communications proposed as Section 19.61 (95.81) in the Notice of Proposed Rule Making.

36. In addition to a consideration of the preceding matters, the Commission has also considered the various requests that the Commission modify specific provisions of adopted amendments to increase the number of interstation channels, relax the antenna height limitations, alter the time limitations on interstation communications, and delete or modify certain of the prohibited uses set forth in Section 95.83. However, for the reasons contained in the Report and Order, the amendments as adopted are needed to permit the fullest development of the service as originally intended and the arguments advanced are not persuasive that the public interest requires any modification thereof at this time. Under the Commission's policy of continuing review of the regulations, it will consider the possibility of further changes in the light of future developments in the service.

37. ACCORDINGLY, after reconsideration, IT IS ORDERED, this 24th day of February 1965, that Section 95.83(a)(1) of the rules IS AMENDED as shown in the Appendix attached hereto, and that all other amendments to Part 95, Citizens Radio Service, adopted by the Report and Order (FCC 64-687) on July 22, 1964, ARE AFFIRMED; and

38. IT IS FURTHER ORDERED, That these rules shall become effective April 26, 1965; and

39. IT IS FURTHER ORDERED, That to the extent that they request any action not ordered herein, the petitions for reconsideration and/or rehearing listed in paragraph (1) ARE DENIED.

Federal Communications Commission
Ben F. Waple
Secretary

Attachment
Released: March 1, 1965

NOTE: Rules changes herein will be covered by T.S. VI(64)-4.

Appendix

Section 95.83(a)(1) is amended by adding the following Note:

§ 95.83 Prohibited uses

(a) * * *

(1) * * *

Note: The following are typical, but not all inclusive, examples of the types of communications evidencing a use of Citizens radio as a hobby or diversion which are prohibited under this rule:

"You want to give me your handle and I'll ship you out a card the first thing in the morning;" or "Give me your 10-20 so I can ship you some wallpaper." (Communications to other licensees for the purpose of exchanging so-called "QSL" cards.)

"I'm just checking to see who is on the air."

"Just calling to see if you can hear me. I'm at Main and Broadway."

"Just heard your call sign and thought I'd like to get acquainted;" or "Just passing through and heard your call sign so I thought I'd give you a shout."

"Just sitting here copying the mail and thought I'd give you a call to see how you were doing." (Referring to an intent to communicate based solely on hearing another person engaged in the use of his radio.)

"My 10-20 is Main and Broad Streets. Thought I'd call so I can see how well this new rig is getting out."

"Got a new mike on this rig and thought I'd give you a call to find out how my modulation is."

"Just thought I would give you a shout and let you know I am still around. Thanks for coming back."

"Clear with Venezuela. Just thought I'd let you know I was copying you up here."

"Thought I'd give you a shout and see if you knew where the unmodulated carrier was coming from."

"Just thought I'd give you a call to find out how the skip is coming in over at your location."

"Go ahead breaker. What kind of a rig are you using? Come back with your 10-20."

Appendix "C"

United States Court of Appeals
For the Ninth Circuit

California Citizens Band Association, Incorporated, Petitioner, vs. United States of America and Federal Communications Comm., Respondents.	No. 20,030

JUDGMENT

Upon Petition to Review an order of the Federal Communications Commission

This Cause came on to be heard on the Transcript of the Record from the Federal Communications Commission and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Federal Communications Commission in this Cause be, and hereby is affirmed.

Filed and entered: March 7, 1967

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Friday, April 21, 1967

Before: Madden, Judge of the Court of Claims,
Hamley and Ely, Circuit Judges

ORDER DENYING PETITION
FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed April 6, 1967 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix "D"

STATUTES AND CONSTITUTIONAL PROVISIONS

5 *USC* 1033:

Chap. 19A

"The venue of any proceeding under this chapter shall be in the judicial circuit wherein is the residence of the party or any of the parties filing the petition for review, or wherein such party has its principal office, or in the United States Court of Appeals for the District of Columbia."

5 *USC* 1034:

Chap. 19A

"Any party aggrieved by a final order reviewable under this chapter may, within sixty days after the entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the attorney general."

47 *USC* 303 (r):

Powers and duties of Commission.

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

47 *USC* 402 (a):

"Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5."

47 *USC* 501:

General Penalty

"Any person who willfully and knowingly does or causes or suffers to be done any act, matter or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000.00 or by

imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000.00 or by imprisonment for a term not exceeding two years, or both."

47 *USC* 502:

Violation of rules, regulations, etc.

"Any person, who willfully and knowingly violates any rule, regulation, restriction or condition made or imposed by the Commission under the authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Article I, Sec. 9 U.S. Constitution:

Limitation on Powers Granted to the United States.

"3. No bill of attainder or ex post facto law shall be passed."

Fifth Amendment of U.S. Constitution

(Due Process Clause)

"No person shall . . . be deprived of life, liberty, or property, without due process of law;"

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 396

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, A CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1–26) is reported at 375 F. 2d 43. The Commission's report and order is reported at 29 Fed. Reg. 11099; its memorandum opinion and order denying reconsideration (Pet. App. B, 27–60) is reported at 30 Fed. Reg. 2706.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, 61) was entered on March 7, 1967, and a petition for

273-693—67

rehearing was denied on April 21, 1967 (Pet. App. C, 62). The petition for a writ of certiorari was filed on July 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a rule-making proceeding in which the Commission adopted new rules imposing restrictions on the use of frequencies assigned to the Citizens Band Service conformed to the procedural requirements of the applicable statutes.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*) are printed in the petition (Pet. 10–11). Section 553 of Title 5 of the United States Code, 80 Stat. 383, and the relevant portions of the Commission's Rules and Regulations are printed in the Appendix, *infra*, pp. 11–13.

STATEMENT

The Citizens Radio Service—designed for private, short-range radio communication with minimal licensing requirements[1]—originated in 1945 when the Federal Communications Commission, after extensive

[1] This service is to be distinguished from the Amateur Radio Service, which fulfills an entirely different purpose. Amateur licenses are granted for hobby-type activities and only after the applicant has demonstrated some technical proficiency. See part 97 of the Commission's rules, 47 C.F.R. 97.1 *et seq.* A hobby-type communication has been defined as "operating the radio station as an activity in and of itself," 47 C.F.R. 95.83(a)(1), rather than for the purpose of conveying specific messages.

inquiries and hearing, allocated a portion of the radio spectrum for a new service, intended for essential local communications such as those entailed in the operation of department stores, farms, and construction projects. Originally, limitations on usage were kept at a minimum in order to foster development of the service (Pet. App. A, 2). However, in 1949 the Commission codified the rules governing the new service and announced certain prohibitions on the types of communications allowed. 14 Fed. Reg. 1596.

In 1958, the Commission revised the rules and established a new class of station (Class D), authorized to operate on certain frequencies in the 27-megacycle band.[2] The new class was created to fulfill the increasing need for short-distance voice communication by radio for personal or business use. 23 Fed. Reg. 6128. Eligibility requirements were minimal, and the number of Citizens Band licensees began to expand rapidly.

It soon became apparent that a substantial number of Class D licensees—contrary to the original purpose of the Citizens Radio Service—were engaging in hobby-type activities, lengthy transmissions of idle chatter, and long-distance contacts commonly called "skips". Such communications were inimical to the public interest because they resulted in interference with those licensees who had a definite and legitimate need for short distance radio communication and

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[2] The rules provide for three other classes of Citizens Band licensees. See 47 C.F.R. 95.3(b). For purposes of this case, however, only Class D stations, representing more than 90 percent of the total number at present, need be considered (Pet. App. A, 3, n. 2).

who restricted their use of the allocated frequencies to purposes permitted by the rules. They also violated the basic nature of the service—communication between units of the same station rather than between different stations. 29 Fed. Reg. 11101. Increasing misuse of the service prompted the Commission in 1960 to amend its rules in order to make more explicit the restrictions on the kinds of communications permitted in the service. 25 Fed. Reg. 1408. The Commission again emphasized that the service was intended not for hobby-type activities, but for useful substantive messages relating to the business or personal activities of the individuals concerned. 25 Fed. Reg. 1411.

By November 1962, there were 350,000 Class D licensees, and abuse of operating privileges had become so widespread as to threaten the utility of the service (Pet. App. A, 5). The Commission, therefore, issued a Notice of Proposed Rule Making in which it proposed further amendment of the rules in order to enunciate even more clearly the prohibited and permissible uses of the service in accordance with its original purposes. More than 2,500 comments, representing many divergent views, were received and analyzed. In its Report and Order of 1964 adopting the new amendments, 29 Fed. Reg. 11099, the Commission added a new section to the rules, elaborating on the more important restrictions. See 47 C.F.R. 95.83(a) (1)–(16).

Since the majority of the abuses had occurred during communications between stations of different licensees, inter-station communication was restricted to seven specific frequencies out of the 23 available. All

licensees communicating with units of their own station (*i.e.* intra-station) remained free to use any of the 23 frequencies reserved for Class D usage. 29 Fed. Reg. 11101, 47 C.F.R. 95.41. The new rules, while retaining the existing limitation on the duration of inter-station communications, lengthened the silent period between such messages from two to five minutes. 47 C.F.R. 95.91(b).

Petitioner, among others, sought reconsideration; it was denied. 30 Fed. Reg. 2706. Petitioner then filed a petition for review in the court of appeals. On March 7, 1967, the court affirmed the orders of the Commission (Pet. App. A, 1–26). After a detailed analysis of the contentions of the petitioner, and a thorough consideration of statutory and judicial authorities, the court concluded that the Commission's actions were reasonable and that no basis had been shown for disturbing them (Pet. App. A, 24–26). It further held that the Commission had not committed error in promulgating the rule amendments without public evidentiary hearings (Pet. App. A, 21).

ARGUMENT

1. There is no merit to petitioner's argument (Pet. 10–17) that the rule changes lengthening the required silent period between inter-station transmissions and reducing the number of available channels for inter-station use from 23 to 7 constituted license modifications that required a trial-type hearing. To be sure, 47 U.S.C. 303(f) provides that no changes in the frequencies or times of operation of any station may be made without the consent of the licensee, unless after

a public hearing the Commission determines such changes to be in the public interest. But, as the Commission held, this provision applies only to those cases where the Commission changes the basic license right—*e.g.*, the times of day during which a licensee may operate his facility—and not to the kind of change effected here (Pet. App. B, 52). The Class D licensee may continue to operate his facility on a 24-hour basis. The only change made by the rules in this respect is that the required silent period between inter-station transmissions is lengthened from two to five minutes. And there is no change in the rules governing intra-station communications.

Unlike the broadcast services, the Citizens Radio Service is characterized by shared use of the assigned frequencies, and it has long been necessary for the licensees to restrict their use of the airwaves to essential and brief communications in order to permit widespread use of the channels. Thus, as the court of appeals observed (Pet. App. A, 20):

> The rule change in question * * * constitutes a relatively minor adjustment. In so concluding, we take note that the primary purpose of a * * * Class D license is for intra-station communication. Minor changes in carrying on inter-station communications could not, therefore, be considered of sufficient consequence to entitle a Class D licensee to a public hearing under section 303(f).

The Commission and the court reached the same result, and rightly so, with respect to the restriction of inter-station transmissions to seven of the 23 assigned

channels (Pet. App. B, 50–51; Pet. App. A, 21, n. 14). In the Citizens Band Service, specific frequencies among the 23 available are not assigned to licensees. The prior rules permitted use of any of the 23 channels, primarily for intra-station uses, and secondarily for communications with other Class D stations. Under the amended rules, the same 23 frequencies remain available to all Class D stations but only seven of them may be employed for inter-station use. As the Commission said: "Since all 23 frequencies continue to be available for the primary purpose of this service, viz., communications between units of the same station, this change in usage does not constitute 'changes in the frequencies' available to any Class D stations within the meaning of Section 303(f)." (Pet. App. B, 51.)[3]

Petitioner's reliance upon 47 U.S.C. 316—which provides that a license modification may be effected only after a public hearing unless the licensee acquiesces in the modification—is similarly misplaced. Here, the Commission did not modify an individual license. It promulgated rules for the future of general applicability to an entire class. Accordingly, it properly followed the procedures for general rule-making as set forth in 5 U.S.C. 553. *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33; *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624

[3] The rules specifically provide for emergency operation, 47 C.F.R. 95.85, and waivers may be had upon a sufficient showing. 47 C.F.R. 1.3.

(C.A.D.C.), certiorari denied, 385 U.S. 843. The rules in question affect 840,000 licensees; the policy questions explored and determined in the rule-making inquiry were national in scope and equally applicable to the entire class. No facts bearing upon the particular situation of any of petitioner's members, or any other individual licensee, were considered by the Commission. Relying on the cases cited above (and others) the court of appeals held (Pet. App. A, 17–18) that, in these circumstances, no hearing was required:

> [I]t is apparent from a reading of the statute that its primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee. We therefore hold that the general rule making procedure followed by the Commission was not violative of section 316(a) of the Act.

2. There is no merit in the points raised by petitioner concerning evidentiary matters (Pet. 18–20). Since this rule-making proceeding was not required to be conducted on the basis of a record, 5 U.S.C. 553—

> it was not necessary for the Commission to receive any evidence, as such, in this rule making proceeding. It was necessary only for the Commission to provide opportunity for, and consider, "written data, views, or arguments with or without opportunity for oral presentation," and this it did. * * * It follows that section 706 (2)(E) [of 5 U.S.C.] does not entitle petitioner to request this court to review the substantiality of the evidence. [Pet. App. A, 22.]

The Commission was not limited to consideration of evidence presented in a formal manner. It was free to act upon the basis of information available in its files and its general knowledge and experience. *Pacific Coast European Conference* v. *United States,* 350 F. 2d 197, 205 (C.A. 9). See, also, *American Airlines, Inc.* v. *Civil Aeronautics Board, supra,* at 629.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

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JOHN H. CONLIN,
Associate General Counsel,

WILLIAM L. FISHMAN,
Counsel,
Federal Communications Commission.

AUGUST 1967.

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[4] The cases relied upon by petitioner are inapposite. In each, the proceeding was adjudicatory or quasi-judicial in nature, and the agency was therefore required to act on the basis of the evidentiary record.

APPENDIX

Section 553 of Title 5 of the United States Code, 80 Stat. 383, 384, provides in pertinent part:

* * * * *

> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

* * * * *

The Rules and Regulations of the Federal Communications Commission provide in pertinent part:

> 47 C.F.R. Section 95.91 **Duration of transmissions.**
>
> (a) All communications or signals, regardless of their nature, shall be restricted to the minimum practicable transmission time. The radiation of energy shall be limited to transmissions modulated or keyed for actual permissible communications, tests, or control signals. Continuous or uninterrupted transmission from a single station or between a number of communicating stations is prohibited, except for communications involving the immediate safety of life or property.

(b) Communications between or among Class D stations shall not exceed 5 consecutive minutes. At the conclusion of this 5-minute period, or upon termination of the exchange if less than 5 minutes, the station transmitting and the stations participating in the exchange shall remain silent for a period of at least 5 minutes and monitor the frequency or frequencies involved before any further transmissions are made. However, for the limited purpose of acknowledging receipt of a call, such a station or stations may answer a calling station and request that it stand by for the duration of the silent period. The time limitations contained in this paragraph may not be avoided by changing the operating frequency of the station and shall apply to all the transmissions of an operator who, under other provisions of this part, may operate a unit of more than one citizens radio station.

* * * * *

47 C.F.R. Section 95.83(a) **Prohibited uses.**

(a) A Citizens radio station shall not be used:

(1) For engaging in radio communications as a hobby or diversion, i.e., operating the radio station as an activity in and of itself.

[Note omitted.]

(2) For any purpose, or in connection with any activity, which is contrary to Federal, State, or local law.

(3) For the transmission of communications containing obscene, indecent, or profane words, language, or meaning.

(4) To carry communications for hire, whether the remuneration or benefit received is direct or indirect.

(5) To communicate with stations authorized or operated under the provisions of other parts of this chapter, with unlicensed stations, or with U.S. Government or foreign stations, except for communications pursuant to §§ 95.85(b) and 95.121 * * *.

(6) For any communication not directed to specific stations or persons, except for: (i) Emergency and civil defense communications as provided in §§ 95.85(b) and 95.121, respectively, (ii) test transmissions pursuant to § 95.93, and (iii) communications from a mobile unit to other units or stations for the sole purpose of requesting routing, directions, assistance to disabled vehicles or vessels, information concerning the availability of food or lodging, or any other assistance necessary to a licensee in transit.

(7) To convey program material for retransmission, live or delayed, on a broadcast facility. [Note omitted.]

(8) To interfere maliciously with the communications of another station.

(9) For the direct transmission of any material to the public through public address system or similar means.

(10) To transmit superfluous communications, i.e., any transmissions which are not necessary to communications which are permissible.

(11) For the transmission of music, whistling, sound effects, or any material for amusement or entertainment purposes, or solely to attract attention.

(12) To transmit the word "MAYDAY" or other international distress signals, except when a ship, aircraft, or other vehicle is threatened by grave and imminent danger and requests immediate assistance.

(13) For transmitting communications to stations of other licensees which relate to the technical performance, capabilities, or testing of any transmitter or other radio equipment, including transmissions concerning the signal strength or frequency stability of a transmitter, except as necessary to establish or maintain the specific communication.

(14) For relaying messages or transmitting communications for a person other than the licensee or members of his immediate family, except: (i) Communications transmitted pursuant to §§ 95.85(b), 95.87(b)(7), and 95.121; and, (ii) upon specific prior Commission approval, communications between citizens radio stations at fixed locations where public telephone service is not provided.

(15) For advertising or soliciting the sale of any goods or services.

(16) For transmitting messages in other than plain language. Abbreviations, including nationally or internationally recognized operating signals, may be used only if a list of all such abbreviations and their meaning is kept in the station records and made available to any Commission representative on demand.

(b) A Class D station may not be used to communicate with, or attempt to communicate with, any unit of the same or another station over a distance of more than 150 miles.

(c) A licensee of a Citizens radio station who is engaged in the business of selling Citizens radio transmitting equipment shall not allow a customer to operate under his station license. In addition, all communications by the licensee for the purpose of demonstrating such equipment shall consist only of brief messages addressed to other units of the same station.

U.S. GOVERNMENT PRINTING OFFICE: 1987

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 396

CALIFORNIA CITIZENS BAND ASSOCIATION, INCORPORATED, a corporation,
Petitioner,

vs.

THE UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

CLOSING BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

REBUTTAL ARGUMENT

1. INTENT AND PURPOSE OF THE CITIZENS RADIO SERVICE

Petitioner wishes to correct an allegation made in respondent's brief in connection with the purpose of the Citizens Radio Service. Respondent states as a fact on page 4 of its brief: "They also violated the

basic nature of the service-communication between units of the same station rather than between different stations. 29 Fed Reg 11101." It is true that this policy was enunciated in 1964 by respondent Commission in 29 Fed Reg 11101, but that had not been its earlier intention as shown in 13 Fed Reg 4796 of August 19, 1948 wherein the definition of Citizens Radio Service was given as follows:

> "A fixed and mobile service intended for use for private or personal radio communication, radio signalling, control of objects or devices by radio, and other purposes not specifically prohibited herein. Any citizen of the United States eighteen years of age or over is eligible to be licensed in this service. . . . Each station in the Citizens Radio Service is authorized to communicate with other stations in this service."

Nothing was said about the alleged basic purpose being the communication between units of the same licensee. This idea was an afterthought brought in many years later after thousands of citizens had secured licenses and had purchased many millions of dollars of equipment to operate on the Citizens Class D Band.

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2. IS THE PROTECTION AFFORDED BY THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION ONLY AVAILABLE IN RESPECT TO "SUBSTANTIAL" VIOLATIONS OF CONSTITUTIONAL RIGHTS?

Respondent in its brief on page 6 thereof adopts and admits the view of the court of appeal that there was "a relatively minor adjustment" in the licensees' freedom to operate in that transmission time was

shortened and frequencies reduced from 23 to 7 in inter-station communication. 47 U.S.C. 316 provides that a license modification may be effected only after a public hearing unless the licensee acquiesces in the modification. Here petitioner certainly did not acquiesce in the modification but on the contrary demanded a hearing. The commission and the court of appeal did not think the encroachment was sufficient to necessitate a hearing. Petitioner feels otherwise. If an administrative agency has the right to determine what amount of encroachment on constitutional rights is necessary before due process of law is afforded, then we have a government of men and not of law. Due process of law requires that *all* encroachments be protected against. Our founding fathers were extremely vehement in their insistence that *all* rights afforded to the people by the Constitution must be safeguarded. Alexander Hamilton, in writing *The Federalist,* No. 78, on page 492, *The Belknap Press of Harvard University Press,* 1961, states on this subject:

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

3. CONCLUSION

It is respectfully submitted that the "Whittling" away of constitutional rights by governmental agencies on the ground that the encroachment is not substantial enough to warrant the application of constitutional safeguards is void under the "Due Process" clause of the Fifth Amendment and should be stopped. Petitioner requests that this honorable court grant its petition for a writ of certiorari in the above entitled cause.

Dated, Oakland, California,
September 19, 1967.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

DONALD M. SEA,
Of Counsel.

CERTIORARI DENIED